

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2183

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

ANONYMOUS, AN ATTORNEY ADMITTED TO
PRACTICE IN THE STATE OF NEW YORK,

Plaintiff-Appellant,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK and JOHN G. BONOMI, Chief Counsel, Committee on
Grievances of the Association of the Bar of the City of New
York,

Defendants-Appellees.

*On Appeal from the U.S. District Court for the Southern
District of New York.*

APPELLANT'S APPENDIX

ANDERSON, RUSSEL, KILL &
OLICK, P.C.

Attorneys for Plaintiff-Appellant

630 Fifth Avenue

New York, New York 10020

397-9700

(7674)

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UNITED STATES DISTRICT COURT

1a JUDGE GRIESA

Jury demand date:

74 CIV. 2398

D. C. Form No. 106 Rev.

[illegible]

DATE	PROCEEDINGS	Date Order Judgment
Jun 4-74	Filed Complaint & issue summons.	
Jun 19-74	Filed defts cross-motion & affdvt to dismiss the complaint. Ret 6-24-74.	
Jun 19-74	Filed defts affdvt in opposition to pliffs application for prelim. inj.	
Jun 19-74	Filed defts memo in opposition to prelim. inj. & in support of dismissal of the complaint.	
Jun 19-74	Filed pliffs supplemental affdvt in opposition to motion to dismiss.	
Jun 19-74	Filed pliffs supplemental memo of law respecting the doctrine of of federal abstention.	
Jun 24-74	Filed summons & return - served Association of the Bar of the City Of N.Y. 6-13-74, & John G. Bonomi - 6-13-74.	
Jun 10-74	Filed transcript of record of proceedings, dated July 3, 1974.	
Aug 1-74	Filed Opinion #41049. Pliffs motion for a preliminary injunction is denied, & defts motion to dismiss the complt is granted.	
	So Ordered. GRIESA, J. m/n	
Aug 27-74	Filed Pltff's Notice of appeal to USCA from the opinion & order dated 7-31-74 dismissing the pltff's complaint. Notice Mailed to John G. Bonomi, on 8-29-74.	
Aug 30-74	Filed Pltff's reply Memo in Support of a Preliminary Injunction.	
Aug 30-74	Filed Further Reply affidavit in support of Pltff's motion for a preliminary injunction and in ipposition to defts' cross-motion to dismiss.	
Aug 30-74	Filed Reply affdvt. in support of pltff's motion for a preliminary injunction and affdvt. in opposit ion to defts' cross motion to dismiss.	
Aug 30-74	Filed Defts' supplementary affdvt. by Marry McDonald.	
Aug 30-74	Filed Defts' supplementary memo in opposition to preliminary Injunction, etc.	
Aug 30-74	Filed Pltff's Order to show Cause with a TRO for Preliminary Injunction ret. 6-17-74.	
Aug 30-74	Filed Pltff's Memo. in support of a Preliminary Injunction.	

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

ANONYMOUS, an Attorney Admitted to
Practice in the State of New York,

Plaintiff

v.

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK and JOHN G. BONOMI,
Chief Counsel, Committee on
Grievances of the Association of the
Bar of the City of New York,

Defendants

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon ANDERSON, RUSSELL, KILL
& OLICK, P.C.,

plaintiff's attorney S, whose address 600 Fifth Avenue, New York, N.Y. 10020,

an answer to the complaint which is herewith served upon you, within 20 days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date: New York, New York
June 4, 1974

[Seal of Court]

COMPLAINT (Filed June 4, 1974)

4a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ANONYMOUS, an Attorney Admitted to
Practice in the State of New York,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK and JOHN G. BONOMI, Chief
Counsel, Committee on Grievances of the
Association of the Bar of the City of
New York,

Defendants.
-----X

COMPLAINT

74 Civ. 2398-TPG

Plaintiff, by his attorneys, ANDERSON, RUSSELL,

KILL & OLICK, P.C., for his complaint herein, alleges as follows:

JURISDICTION

1. This action arises under the Constitution and Laws of the United States and is brought under Amendments V and XIV of the Constitution and Title 28 United States Code §§1331, 1343, 2201 and 2202 to declare as unconstitutional and void and to restrain and enjoin the enforcement of Sections 90 and 476a of the Judiciary Law of the State of New York, the Canons of Professional Ethics and Part 603 of the Rules of the Appellate Division of the Supreme Court of the State of New York in and for the First Department insofar as the same permit the use in disciplinary proceedings against attorneys of testimony elicited under a grant of immunity from prosecution following an attorney's exercise of his constitutional privilege against self-incrimination and thereby deny attorneys the equal protection of the law.

2. The matter in controversy exceeds the sum of \$10,000.00 exclusive of interest and costs.

PARTIES

5a

3. Plaintiff, ANONYMOUS, is an attorney and counselor at law duly admitted to practice in the State of New York with offices and a principal place of business in the County, City and State of New York.

4. Upon information and belief, defendant, The Association of the Bar of the City of New York is an organization or association of attorneys with offices and a principal place of business in the County, City and State of New York, designated by Sections 476a and 90 of the Judiciary Law of the State of New York and Part 603 of the Rules of the Appellate Division of the Supreme Court held in and for the First Department to conduct preliminary investigation of professional misconduct through its Committee on Grievances and to recommend to the Courts and to prosecute before the Courts of the State of New York matters involving the discipline of attorneys.

5. Defendant, John G. Bonomi, is Chief Counsel to the Committee on Grievances of the Association of the Bar of the City of New York with offices and a principal place of business in the County, City and State of New York in which capacity he is the chief investigator and principal prosecutor in matters involving the discipline of attorneys.

CLAIM

6. Heretofore and on or about October 5, 1968, plaintiff was called to testify before a Grand Jury empanelled by the Supreme Court of the State of New York, held in and for the County of New York at which time he refused to testify

on the grounds, inter alia, that his answers, to the questions propounded might tend to incriminate him.

7. Thereupon the said Grand Jury, on recommendation of the District Attorney of New York County, granted plaintiff immunity from any state action or violation arising out of or incident to his testimony before it.

8. Plaintiff thereafter on October 5, 1968, November 15, 1968 and November 21, 1968 testified fully, freely and truthfully pursuant to such grant of immunity.

9. On or about April 16, 1974, defendants instituted disciplinary proceedings against plaintiff based solely and exclusively upon his testimony under grant of immunity before the New York County Grand Jury.

10. Defendants have failed and refused, despite plaintiff's application therefor, to preclude the use of plaintiff's said Grand Jury testimony and are now proceeding to use the same against him in hearings now pending before the Committee on Grievances of the Association of the Bar of the City of New York being prosecuted by defendant Bonomi, all in violation of plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

11. Upon information and belief, defendants' aforesaid actions in proceeding against plaintiff are based solely and exclusively on his testimony before a New York County Grand Jury under grant of immunity and are part of a plan and program designed to undermine and subvert the constitutional privilege against self-incrimination as applied to that class or category

of citizens known as attorneys and to deny them the equal protection of the laws and are part of a plan to employ disciplinary proceedings and threats of disbarment to discourage attorneys from exercising such constitutional rights.

12. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays:

(a) For an order granting a preliminary injunction in this action enjoining defendants, their representatives, agents and employees, and all those acting in concert with them from proceeding with disciplinary proceedings against plaintiff pending entry of final judgment herein; and

(b) For entry of final judgment declaring that attorneys may not be subjected to disciplinary proceedings on the basis of judicially compelled testimony elicited under grants of immunity and permanently enjoining defendants, their representatives, agents and employees, and all those acting in concert with them, from disciplining plaintiff on the basis of such compelled testimony; and

(c) For such other and further relief as to the Court may seem just and proper in the premises, including the costs and disbursements of this action.

Dated: New York, New York
June 3, 1974

ANDERSON, RUSSELL, KILL & OLICK, P.C.,
Attorneys for plaintiff

By:

Steven M. Pesmer

A Member of the Firm
600 Fifth Avenue
New York, New York 10020
(212) 541-8100

ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT
BE GRANTED ENJOINING PROSECUTION OF DISCIPLINARY PROCEEDING
WITH TEMPORARY RESTRAINING ORDER
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

8a

-----X
ANONYMOUS, an Attorney Admitted to :
Practice in the State of New York, :

Plaintiff, :

-against- :

THE ASSOCIATION OF THE BAR OF THE :
CITY OF NEW YORK and JOHN G. BONOMI, :
Chief Counsel, Committee on Grievances :
of the Association of the Bar of the :
City of New York, :

Defendants. :
-----Y

ORDER TO SHOW CAUSE
WITH ~~RESTR~~ A TEMPORARY
RESTRAINING ORDER

74 Civ. 2398 TPG

Upon the annexed Affidavit of Arthur S. Olick, Esq.,
sworn to the 3rd day of June, 1974, and the summons and
complaint heretofore filed herein, it is

TPG
7PG
ORDERED, that defendants SHOW CAUSE before this
Court ~~in Room 1106~~, to be held in Room 1106, United States
Courthouse, Foley Square, in the County, City and State of New
York, on the 17th day of June, 1974, at ~~10:30~~^{4:00} o'clock in the
~~forenoon~~^{after} of that day, or as soon thereafter as counsel may be
heard, why an order should not be made and entered herein
pursuant to F.R.Civ. Proc. 65(a) granting plaintiff a preliminary
injunction enjoining defendants, their representatives, agents
and employees, and all those acting in concert with them, from
prosecuting or otherwise maintaining any disciplinary proceedings
against plaintiff pending the entry of final judgment herein
predicated upon compelled testimony elicited from such plaintiff
by means of a grant of immunity, such prosecution being repugnant
to Amendments V and XIV of the Constitution of the United States,
and for such other and further relief as to the Court may seem
just and proper; and it is further

ORDERED, that until the hearing and determination of this motion defendants, their representatives, agents and employees, and all those acting in concert with them, be and they hereby are stayed pursuant to F.R.Civ. Proc. 65(b) ^{Using the aforesaid compelled testimony and with any disciplinary proceeding involving plaintiff before the panel presently assigned to this matter} from proceeding with disciplinary proceedings ~~now pending~~

~~against plaintiff~~; and it is further

^{ORDERED, that the provision for security herein be waived, and it is}
 further

ORDERED, that ^{personal} service upon John G. Bonomi, Esq., counsel to the Committee on Grievances of the Association of the Bar of the City of New York of a copy of this Order, annexed ^{and memorandum of law} affidavit and summons and complaint ^{on} or before the 4th day of June, 1974, at 5:00 p.m. be deemed good and sufficient service thereof.

Dated: New York, New York
 June 4, 1974

ISSUED AT

1:45 P.M. 6/4/74

s/ Thomas P. Griesa
 U.S.D.J.

On October 18, 1968, plaintiff was called before a New York County Grand Jury and interrogated by Assistant District Attorney Frank J. Rogers, Esq., Plaintiff was interrogated concerning his relationships with two of his clients, Melvin Kaufman, a builder, and Ralph Elaychar. The District Attorney's Office was then investigating the possibility

that Mr. Kaufman, through Mr. Elaychar, had paid a sum of money to be used to improperly influence certain New York City officials in connection with a matter pending before the New York City Board of Standards and Appeals. 11a

5. When first called to testify, plaintiff invoked the privilege against self-incrimination and refused to answer the questions propounded to him by Mr. Rogers. Thereupon, Assistant District Attorney Rogers asked plaintiff to step out of the Jury Room and asked the Grand Jury to grant plaintiff immunity. Plaintiff was then granted immunity in the following language:

"The granting of immunity means you cannot be prosecuted for any State violation as a result of your testimony here today or documents that you may have produced here today. However, you can be prosecuted for the crime of perjury, or if you lie to this Grand Jury, tell the Jury something that is not truthful, and for the crime of contempt, if you refuse to answer a question, a legal, proper and relevant question, or if you give an answer that can be deemed to be evasive.

* * *

I remind you that immunity is still in effect and I also caution you that if this Grand Jury believes that you are avoiding or attempting to avoid giving answers to the questions or deliberately avoiding giving answers to questions, that you can be charged with contempt for that; and if you lie to this Grand Jury, that you can be charged with the crime of perjury.

* * *

As I explained before, those are the only two State crimes that you can be charged with as a result of your testimony here today or documents that you produce here...."

6. Pursuant to such grant of immunity, plaintiff testified at length before the New York County Grand Jury on October 18, 1968, November 15, 1968, and November 21, 1968. His testimony resulted in the indictment and ultimate conviction of both Messrs. Kaufman and Elaychar. That was the last plaintiff heard of the matter until 1973 when he suddenly learned, to his dismay, that the Association of the Bar of the City of New York, through its Committee on Grievances, was investigating his

7. By letter dated April 16, 1974, the Committee on Grievances of the Association of the Bar of the City of New York of which John G. Bonomi, Esq., is Chief Counsel, charged plaintiff with professional misconduct and conduct prejudicial to the administration of justice in violation of Section 90 of the Judiciary Law of the State of New York and Canons 15 (How Far a Lawyer May Go in Supporting a Client's Cause), 16 (Restraining Clients on Improprieties), 29 (Upholding the Honor of the Profession), and 32 (The Lawyer's Duty in its Last Analysis) of the Canons of Professional Ethics. A copy of the charge letter is annexed hereto as Exhibit "A" and made a part hereof.

8. On May 7th, 1974, the Committee on Grievances proceeded to present its case against the plaintiff. Counsel to the Committee acting by Mary McDonald, Esq., offered in evidence before a special panel of the Committee on Grievances the transcript of plaintiff's Grand Jury testimony. Deponent, as counsel to plaintiff, objected to the admission of the Grand Jury testimony on Constitutional grounds. The Committee reserved decision and retired to consider its ruling. Thereafter, deponent was advised by Miss McDonald that the Panel had overruled deponent's objection and that she was distributing copies of the Grand Jury testimony to the various members of the Panel in preparation for a further hearing now scheduled for 4:00 p.m. on Tuesday, June 4, 1974. Miss McDonald further advised deponent that she would rest her case against plaintiff on his Grand Jury testimony.

9. It is clear that plaintiff had no choice but to testify before the New York County Grand Jury when Assistant District Attorney Rogers granted him what is tantamount to transactional immunity. To have failed to testify would have resulted in a contempt citation and inevitable conviction thereon. Having testified, plaintiff is now faced, some six years after the operative events, with disciplinary proceedings based entirely upon his compelled testimony which can result in his disbarment. It is submitted that disciplinary proceedings of this nature are criminal in nature and are entitled to the same Constitutional protections as are afforded in ordinary criminal cases. Certainly, plaintiff has at risk substantial rights in the nature of his ability to earn a livelihood. To permit the Bar Association and then the New York State Courts to proceed against attorneys solely on the basis of their compelled testimony under grants of immunity manifestly subverts the nature and intent of the Fifth Amendment privilege against self-incrimination.

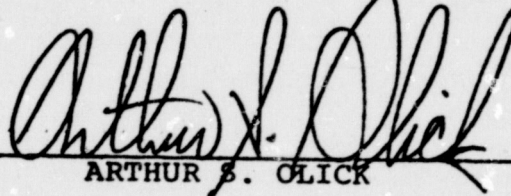
10. Deponent is advised that this matter was called to the attention of the Bar Association by the New York County District Attorney's Office. This is the very same office that compelled plaintiff's testimony under a grant of immunity and promised plaintiff that he would not be subject to any State prosecution. It is apparent that the New York County District Attorney is proceeding against this plaintiff and other attorneys similarly situated in order to deprive them of their livelihood as punishment in circumstances where ordinary criminal proceedings are prohibited. This creates not only an unwarranted subversion of the Fifth Amendment privilege

against self-incrimination but also puts attorneys in the untenable position of second class citizens who can be discriminated against solely because they are licensed by the State.

11. Plaintiff proceeds herein by Order to Show Cause in order to secure a stay of the disciplinary proceedings now pending against plaintiff. Since plaintiff is a member of the Bar of the State of New York with offices here in New York County, he remains at all times subject to the jurisdiction of the State Court and there is no prejudice to the defendants as the result of the stay or preliminary injunction sought by this motion. Certainly, if the Bar Association could wait five to six years after the operative events to bring on disciplinary proceedings they can wait a few more weeks or months until the Federal Courts determine the Constitutional propriety of its proceeding in the first place.

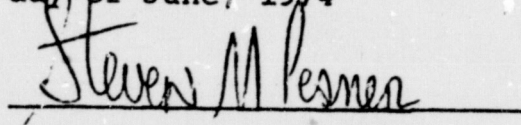
12. The summons, complaint and these motion papers do not set forth the name of the plaintiff in order to avoid the inevitable and irreparable injury which must accompany such revelation. The very fact of the proceedings both before the Grand Jury and before the Bar Association will clearly have an adverse affect upon his reputation and his ability to earn a living as an attorney. Deponent submits to the Court with these papers a letter disclosing the identity of the plaintiff and requests that that letter be kept confidential. The defendants, of course, have been advised of the institution of this action and the making of this motion and are fully aware of the identity of the plaintiff.

13. No previous application has been made for the relief sought herein.


ARTHUR S. OLICK

SWORN to before me this 3rd

day of June, 1974


STEVEN M. PESNER

Notary Public

STEVEN M. PESNER
Notary Public, State of New York
No. 31-4506381
Qualified in New York County
Commission Expires March 30, 1975

COMMITTEE ON GRIEVANCES
OF
THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
36 WEST 44TH STREET
NEW YORK, N. Y. 10036

16a

JOHN G. BONOMI
CHIEF COUNSEL

RONALD EISENMAN
SAUL FRIEDBERG
MORRIS GUTT
MARY McDONALD
PAUL W. PICKELLE
ASSOCIATE COUNSEL

MICHAEL AMBROSIO
DAVID A. COBIN
IRVING PERTEL
ASSISTANT COUNSEL

ROOM 914

AREA CODE 212
MURRAY HILL 2-0606

April 16, 1974

Personal & Confidential

The Committee on Grievances of The Association of the Bar of the City of New York will meet at 36 West 44th Street, New York, N.Y., 10036, Room 900, on Tuesday, May 7, 1974, at 4:00 P.M., to investigate your conduct and to determine whether, as has been alleged:

Charge

You have been guilty of professional misconduct and conduct prejudicial to the administration of justice in violation of Section 90 of the Judiciary Law of the State of New York and Canons 15 (How Far a Lawyer May Go in Supporting a Client's Cause), 16 (Restraining Clients From Improprieties), 29 (Upholding the Honor of the Profession), and 32 (The Lawyer's Duty in Its Last Analysis) of the Canons of Professional Ethics, effective until December 31, 1969, in that:

1. In or about December, 1965, one Melvyn Kaufman, a builder, requested your assistance in finding a means to delay approval of, or block entirely, an application for a zoning variance which was sought by one Sigmund Sommer and which was ultimately to be heard before the New York City Planning Commission.

2. You, thereafter, conferred with one Ralph Elyachar, another builder, concerning Kaufman's request and you sought Elyachar's assistance in obtaining the desired delay or blockage of the Sommer application.

April 16, 1974

17a

3. Mr. Elyachar, thereafter, advised you that he would undertake, with the assistance of other individuals, to delay or block the Sommer application and he further advised you that Kaufman would have to pay a sum of money to be determined by the degree of success attained in either delaying or blocking the application.

4. During the aforesaid conversation, Elyachar refused to reveal to you the identity of the individuals who would be assisting him and he requested that his own identity be concealed from Kaufman.

5. At that time, you believed that the means to be employed by Kaufman and Elyachar in delaying or blocking the Sommer application were to be illegal and that the money to be paid did not constitute a legal fee.

6. Mr. Elyachar, thereafter, presented to you a written schedule of increasing payments to be made by Kaufman which varied depending upon the length of time for which the application was delayed or blocked.

7. You then presented the aforesaid payment schedule to Kaufman who made various changes on it and returned it to you.

8. You then returned the amended payment schedule to Elyachar who subsequently advised you that the amendments were acceptable and you, thereafter, communicated Elyachar's approval to Kaufman.

9. Kaufman thereupon advised you that he would make the initial payment, which you believed to be the sum of \$17,500.00, by withdrawing cash from his private vault and delivering the money to you in a box of wood samples for transmittal to Elyachar.

10. On or about March 12, 1966, the box of wood samples was delivered to your office and pursuant to your instructions was given to Elyachar.

11. At this time, you believed that the money delivered to Elyachar did not constitute a legal fee but was to be used to influence the decisions of public officials.

12. You, thereafter, continued to act as an intermediary between Kaufman and Elyachar in regard to their aforesaid attempt to block or delay the Sommer application.

April 16, 1974

The Committee on Grievances directs that you file a written answer (an original and fifteen (15) copies) of the foregoing charge with its attorney at 36 West 44th Street, New York, N.Y. 10036, on or before May 1, 1974. Such answer is to specifically admit, deny or deny knowledge or information sufficient to form a belief with respect to the aforesaid paragraphs. If you fail to file an answer to each of the aforesaid paragraphs, it will be deemed admitted.

You are further directed to appear before the Committee on Grievances at the time and place specified in the first paragraph hereof when the Committee will hold a hearing with respect to the foregoing matters and to bring with you your entire files with respect to the matters referred to herein including all bank records with reference to the foregoing matters.

You are entitled to be represented by counsel to cross-examine witnesses and to present evidence in your own behalf.

In connection with the foregoing, your attention is directed to Judiciary Law, Section 90, Part 603 of the New York Court Rules and to By-Law XIX of the Association By-Laws.

Very truly yours,

JOHN G. BONOMI
Chief Counsel

JGB MM

cc: Arthur S. Olick, Esq.
Attorney for Respondent
500 Fifth Avenue
New York, New York 10036

CROSS-MOTION TO DISMISS COMPLAINT

19a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ANONYMOUS, an Attorney Admitted to
Practice in the State of New York,

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK and JOHN G. BONOMI,
Chief Counsel, Committee on
Grievances of The Association of the
Bar of the City of New York,

Defendants.

PLEASE TAKE NOTICE that upon the summons and
complaint filed herein on June 4, 1974, the order to show
cause filed herein requesting the grant of a preliminary
injunction returnable June 24, 1974 at 4:00 o'clock in the
afternoon, the affidavit of ARTHUR S. OLICK, Esq., sworn to
June 3, 1974 in support thereof and the affidavit of MARY
McDONALD, Esq., sworn to on June 17, 1974, in opposition
thereto, defendants will cross-move this Court, on June 24,
1974 at 4:00 o'clock in the afternoon for an order pursuant
to Rule 12(b)(6) to dismiss the action because the complaint
fails to state a claim against defendants upon which relief
can be granted.

Dated: New York, New York
June 17, 1974.

JOHN G. BONOMI
CHIEF COUNSEL FOR
THE COMMITTEE ON GRIEVANCES OF
THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK
Attorney for Defendants
Office & P.O. Address
36 West 44th Street
New York, New York 10036
(212) MU 2-0606

TO:

Anderson, Russell, Kill & Olick, P.C.
Attorneys for Plaintiff
600 Fifth Avenue
New York, New York 10020

AFFIDAVIT IN OPPOSITION TO THE MOTION FOR A PRELIMINARY
INJUNCTION

20a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
ANONYMOUS, an Attorney Admitted to
Practice in the State of New York,
Plaintiff,

: AFFIDAVIT IN
: OPPOSITION
: 74 Civ. 2398 (TPG)

- against -

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK and JOHN G. BONOMI,
Chief Counsel, Committee on
Grievances of The Association of the
Bar of the City of New York,

Defendants.
----- X

STATE OF NEW YORK :

: SS.:

COUNTY OF NEW YORK :

MARY McDONALD, being duly sworn, deposes and says:

1. I am Associate Counsel to JOHN G. BONOMI, Chief
Counsel for the Committee on Grievances of The Association of
the Bar of the City of New York, a defendant herein and I
make this affidavit on behalf of JOHN G. BONOMI and THE
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK in opposition
to plaintiff's application for a preliminary injunction
enjoining defendants from prosecuting a disciplinary proceed-
ing against plaintiff predicated upon plaintiff's compelled
testimony pending the entry of a final judgment herein.

2. I am fully familiar with all the facts and
circumstances relevant to this action being the attorney
assigned by defendant BONOMI to the prosecution of a disci-
plinary proceeding against plaintiff.

HISTORY OF DISCIPLINARY PROCEEDING

3. On February 4, 1971, an order was entered in the
Supreme Court of the State of New York, County of New York,
authorizing the release to the Committee on Grievances of the

Grand Jury minutes of the Fourth December, 1967 Grand Jury in a matter entitled People v. John Doe; the Fifth June, 1968 Grand Jury minutes in a matter entitled People v. Harry Hce; and the Fifth October, 1968 Grand Jury minutes in a matter entitled People v. John Doe, all being inquiries involving an attorney, Michael Freyberg, who was convicted of the crime of perjury in the third degree on December 17, 1970.

4. In or about March, 1971, the above Grand Jury transcripts were turned over to defendant's Committee on Grievances by the office of the District Attorney for New York County. Also on or about such date, Assistant District Attorney Francis J. Rogers, the attorney who presented the People's evidence before the above Grand Juries, indicated to Counsel for the Committee on Grievances that the transcripts also included testimony concerning two other attorneys practicing in the First Judicial Department, Herbert Itkin and the plaintiff herein.

5. Thereafter, disciplinary proceedings were initiated against Michael Freyberg and Herbert Itkin by the Committee on Grievances and a review of the transcripts in question brought to light the testimony given by plaintiff on October 18, 1968, November 15, 1968 and November 21, 1968, before the Fifth October, 1968 Grand Jury under a grant of immunity.

6. In testifying, plaintiff outlined the role he played in 1965 and 1966 on behalf of his client, Melvyn Kaufman, in an attempt to delay approval of, or block entirely, an application for a zoning variance which was to be presented before a New York City Agency.

7. Further inquiry was made into this matter by counsel for the Committee on Grievances and on January 11, 1973, a communication was addressed to plaintiff requesting that he appear at the office of the Committee for the purpose of discussing the matter. Plaintiff was advised therein of his right to be represented by counsel.

8. Thereafter, plaintiff retained eminent counsel, well-versed in the law of discipline, who requested permission to submit a written statement by plaintiff concerning his role in the 1965-66 events rather than an initial personal appearance at the office of counsel for the Committee. Such request was granted by your deponent.

9. Thereafter, plaintiff submitted a twenty-five page statement, signed by him and dated April 26, 1973, in which he described his role in the 1965-66 events in thorough detail and, in substance, provided all the information contained in his earlier Grand Jury testimony. Such statement was voluntarily given and plaintiff was under no compulsion to do so.

10. As a result of the evidence then before it, on May 31, 1973, counsel for the Committee on Grievances instituted a disciplinary proceeding against plaintiff by duly serving upon him a notice containing the charge levied against him and alleging the facts upon which it was based.

11. On June 13, 1973, plaintiff submitted an answer thereto substantially admitting the facts as set forth by counsel for the Committee on Grievances, but denying knowledge of any illegality which may have been involved in the above mentioned attempt to delay approval of, or block entirely, an application for a zoning variance.

12. On June 21, 1973, a hearing was held on the charge before a panel of the Committee on Grievances and counsel for the Committee rested its case on plaintiff's Grand Jury testimony and his statement of April 26, 1973, which were received into evidence without objection by plaintiff, who was represented by counsel at all times.

13. Plaintiff testified in his own behalf and was cross-examined by counsel for the Committee and the members of the panel. After deliberation on the matter, the panel sustained the charge against plaintiff and recommended that a disciplinary proceeding be initiated against him in the Supreme Court of the State of New York, Appellate Division, First Department.

14. Thereafter, plaintiff appealed to the Chairman of the Committee on Grievances to be granted a new hearing and after due consideration such application was granted in order to allow plaintiff the benefit of a change in the procedures of the Committee on Grievances not available to him at the time of the first hearing.

15. On April 16, 1974, plaintiff was again duly served with a notice of the charge instituting a new proceeding. On May 30, 1974, after deliberation by the panel of the Committee on Grievances hearing the matter, plaintiff's Grand Jury testimony was received into evidence over plaintiff's objection that utilization thereof in a disciplinary proceeding violated his constitutional privilege against self-incrimination.

16. Plaintiff now moves this court for the entry of a preliminary injunction enjoining the Association of the Bar of the City of New York and John G. Bonomi, Chief Counsel

for its Committee on Grievances, from prosecuting a disciplinary proceeding against him predicated upon his Grand Jury testimony given under grant of immunity.

24a

17. As the record will show; simultaneously with the filing of this affidavit in opposition, defendants are filing a cross-motion requesting the dismissal of the complaint herein. If such motion is granted, the question of whether or not a preliminary injunction should be granted shall become moot. If such motion were denied, defendants submit there are several compelling reasons why a preliminary injunction should not be granted.

FURTHER DELAY OF THE DISCIPLINARY
PROCEEDING WOULD BE DETRIMENTAL

18. It is contended that plaintiff's admitted conduct in the 1965 and 1966 events was unprofessional and as such would warrant discipline after review by the Appellate Division, First Department. It is the unfortunate fact that these events, and plaintiff's participation therein, did not become fully known to the law enforcement agencies of New York City until 1968 when grand jury inquiries were conducted.

19. Thereafter, defendants were not given transcripts of the grand jury testimony until 1971 when the office of the New York County District Attorney had concluded its use of them and its prosecution of various individuals involved in the inquiry was concluded.

20. After receipt of the transcripts by defendants, various priorities had to be established as to the use thereof and it was determined that they would first be utilized in the prosecution of an attorney who had already been convicted of a crime and Herbert Itkin and subsequently would be used in a proceeding against plaintiff.

21. Once such a proceeding was instituted and a 25a
hearing had therein, the matter was never moved into the
Appellate Division due to the fact that plaintiff made appli-
cation for a rehearing, which application was considered and
granted.

22. Thus it is obvious that numerous roadblocks
have slowed the swift prosecution of this matter. If plain-
tiff is guilty of serious professional misconduct, as is
alleged by defendants, any further delay in this matter
would be most regretable and is certainly to be avoided.

23. In a case such as this, a disciplinary pro-
ceeding may not be instituted in the Appellate Division until
1) a hearing is first held before a panel of the Committee on
Grievances and such panel sustains the charge and recommends
prosecution in the courts; 2) such recommendation is approved
by the Executive Committee of The Association of the Bar of
the City of New York and 3) an order is entered by the Appel-
late Division appointing counsel for the Committee on
Grievances as prosecutors for the matter.

24. Obviously, counsel for the Committee is only
launched on the initial stage of the process and through no
fault of its own is attempting to prosecute a matter, as
speedily as possible, whose operative facts concern events
occurring in 1965 and 1966.

25. Plaintiff is the last remaining attorney to be
prosecuted for his conduct in these events (the others having
already been disciplined) and defendants are faced with the
unfortunate and serious circumstance of having to contend
with the defense of laches and such defense becomes stronger
and stronger as the months go by. Furthermore, the interests
of the public and the bar are less and less served when

disciplinary proceedings become so prolonged and where the possibility exists that an attorney guilty of wrongdoing continues in the practice of law.

26. Thus it is imperative that a matter, already fraught with delay, not be further impeded and unnecessarily prolonged. On the other hand, it is contended that the continued prosecution of this matter is in no way unduly prejudicial to plaintiff.

27. First of all, until there is a hearing by the panel of the Committee on Grievances assigned to this matter, and a decision rendered on the merits, there is no way of knowing whether or not a proceeding would be initiated in the Appellate Division.

28. However, assuming for argument's sake that the panel does sustain the charge against plaintiff and does recommend prosecution in the Appellate Division, a de novo proceeding must be initiated there, at which time plaintiff would no doubt again register his objection to the introduction of his Grand Jury testimony. He does not lose the right to press any objections he may have because of adverse rulings by a panel of the Committee on Grievances.

29. Defendants contend that the Appellate Division is the proper forum for a determination on the merits of such an objection and contend that his present application to the federal courts is premature.

30. In conclusion on this point, defendants contend that no purpose would be served in enjoining them from use of plaintiff's Grand Jury testimony during preliminary proceedings and such immediate use would prevent the further delay of this serious matter.

31. Defendants commenced a disciplinary proceeding against plaintiff under the duties imposed upon them by Section 90 of the Judiciary Law of New York State. Their use of plaintiff's Grand Jury testimony is not offensive to his 5th and 14th amendment privileges and said use is in full accordance with well-established New York law.

32. Defendants are legally in possession of the transcript of plaintiff's Grand Jury testimony such being duly obtained by court order.

33. Defendants have not launched themselves upon a new or untried procedure in using such testimony in proving its charge against plaintiff. As is set forth more fully in defendants' brief, the New York cases are clear and undisputed in the holding that compelled testimony may be used in the prosecution of a disciplinary proceeding. Further, the Supreme Court has refused to upset such holdings.

34. Defendants should not be precluded from or delayed in the performance of their tasks such being the expeditious prosecution of plaintiff's matter.

PLAINTIFF HAS WAIVED HIS RIGHT TO OBJECT
TO THE USE OF HIS COMPELLED TESTIMONY IN
A DISCIPLINARY PROCEEDING

35. As noted above, plaintiff submitted a very detailed statement, dated April 26, 1973, to counsel for the Committee on Grievances in which he frankly and candidly admitted the extent of his involvement in the attempt to influence City officials. Further, in later responding to the charge filed against him in the first proceeding, he requested that such statement be deemed a part of his formal answer which he submitted on June 13, 1973.

36. Moreover, on June 21, 1973, the date of the first hearing, plaintiff testified in his own behalf and did not assert his 5th Amendment privilege against self-incrimination to any of the questions posed by counsel for the Committee or the panel members. During the entire proceeding plaintiff was represented by competent counsel who is specialized in the field of discipline. Further, respondent's compelled testimony was received into evidence without objection by plaintiff.

37. Plaintiff now contends that to use his compelled testimony is offensive to his Constitutional privilege against self-incrimination and yet one year ago he freely admitted in writing, and orally under oath, his entire role in the 1965-66 events and, in effect, threw himself upon the mercy of the panel hearing the matter.

38. Defendants contend that even if his privileges against self-incrimination were violated by use of his compelled testimony, he is now precluded from availing himself of his 5th Amendment privilege since he has effectively waived the invocation of such privilege.

39. It would appear to be patently unjust for the federal courts to enjoin defendants from now using plaintiff's compelled testimony which has been resworn to by plaintiff and, in effect, even elaborated upon by him, while he was under no compulsion to do so.

DEFENDANTS SHOULD NOT BE ENJOINED FROM
COMMENCING A NEW DISCIPLINARY PROCEEDING
AGAINST PLAINTIFF BASED ON EVIDENCE
INDEPENDENT OF HIS COMPELLED TESTIMONY

40. Even if this Court decided that a preliminary injunction should be granted in plaintiff's favor, such

injunction should extend only to the use of his compelled testimony. A preliminary injunction, if entered, should not preclude the use of other available evidence against plaintiff. As noted above, defendants have in their possession evidence which could be used in proving the charge against plaintiff independent of his compelled testimony. Plaintiff has put forward no reason why a preliminary injunction should be directed at proceedings in general against plaintiff, but has only offered reason why a proceeding using his compelled testimony should be enjoined.

41. Therefore, while defendants argue no preliminary injunction should be granted, if one were to be entered, it should be limited to a prohibition against a proceeding based upon plaintiff's compelled testimony only.


PLAINTIFF HAS FAILED TO PROVE THAT HE
WILL SUFFER IRREPARABLE INJURY UNLESS
AN INJUNCTION IS GRANTED

42. Plaintiff has failed to demonstrate that he would suffer irreparable injury by having to pursue his remedies and/or request for injunctive relief in the state courts by first applying to the Appellate Division.

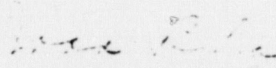
43. In fact, no such injury would be occasioned by plaintiff. Plaintiff cannot be disciplined unless the defendants initiate an action against him in the Appellate Division and then only if the charge against him is sustained. At the present time, proceedings against plaintiff are at a preliminary level and plaintiff's request for injunctive relief, if appropriate at all, should be made to the Appellate Division. During the progress of such application, plaintiff would remain a member in good standing of the New York Bar.

WHEREFORE, defendants pray that an order be entered herein denying a preliminary injunction in this action and further pray for such other and further relief as to the Court may seem just and proper.

Sworn to before me this
17th day of June, 1974.



MARY McDONALD


JOAN BILA
NOTARY PUBLIC, State of New York
No. 24-5315315
Qualified in Kings County
Commission Expires March 30, 1976

REPLY AFFIDAVIT IN SUPPORT OF THE MOTION FOR A PRELIMINARY
INJUNCTION AND IN OPPOSITION TO THE CROSS-MOTION TO
DISMISS

31a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
ANONYMOUS, an Attorney Admitted to
Practice in the State of New York, : 74 Civ. 2398 (TPG)

Plaintiff, : REPLY AFFIDAVIT IN
: SUPPORT OF PLAINTIFF'S
-against- : MOTION FOR A PRELIMINARY
: INJUNCTION AND AFFIDAVIT
THE ASSOCIATION OF THE BAR OF THE : IN OPPOSITION TO
CITY OF NEW YORK and JOHN G. BONOMI, : DEFENDANTS' CROSS MOTION
Chief Counsel, Committee on : TO DISMISS
Grievances of the Association of the :
Bar of the City of New York, :

Defendants. :
-----X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ARTHUR S. OLICK, being duly sworn, deposes and
says:

1. I am a member of the firm of ANDERSON,
RUSSELL, KILL & OLICK, P.C., attorneys for the plaintiff-attorney
herein. I submit this affidavit in reply to the opposing
affidavit of Mary McDonald, Esq., associate counsel to the
defendants and in further support of plaintiff's motion for a
preliminary injunction herein. I also submit this affidavit in
opposition to defendants' cross-motion to dismiss the complaint
for failure to state a claim.

2. In this action plaintiff seeks to prevent
the continuation of disciplinary proceedings before the Bar
Association predicated upon testimony elicited from him by a New
York County Grand Jury under a grant of immunity after plaintiff
asserted his rights under the Fifth Amendment. The complaint

seeks a declaratory judgment and an injunction predicated upon the simple proposition that disciplinary proceedings against an attorney are quasi-criminal in nature and may not be founded solely upon the use of tainted or immunized testimony.

3. Plaintiff has moved for a preliminary injunction which defendants seek to prevent, on the grounds that (a) plaintiff was somehow linked with the notorious Michael Freyberg, Herbert Itkin, James Marcus scandal; (b) the instant application is premature since the State Courts have not yet acted; (c) the Constitutional privilege claimed by plaintiff is inapplicable under "well established New York Law"; (d) the plaintiff has somehow waived his right to object to the use of his compelled testimony; and (e) there is no irreparable harm to the plaintiff if he is disbarred or disciplined in violation of his Constitutional rights. Deponent submits that each of these arguments is patently untenable.

THE TRUE HISTORY OF THE
DISCIPLINARY PROCEEDING

4. The recitation in the defendants' opposing affidavit of the alleged "history" of the disciplinary proceeding against plaintiff is replete with omissions and distortions. It is gratuitously sprinkled with numerous references to other attorneys who have been convicted of crimes, references to "prosecutions", "discipline" and bribery. Defendants obviously seek to impugn plaintiff's character without trial by linking him with the notorious Michael Freyberg and Herbert Itkin who, together with the infamous James Marcus, were involved in numerous corrupt activities during the course of the Lindsay administration in New York City. In truth and in fact this

plaintiff had no connection with Freyberg, Itkin or Marcus and neither the New York County District Attorney nor the Grievance Committee of the Association of the Bar of the City of New York has uncovered a scintilla of evidence linking plaintiff with any of these persons. Defendants have in their possession the Grand Jury testimony and the testimony taken in the disciplinary proceedings involving attorney Michael Freyberg, Lindsay's former Tax Commissioner. This testimony discloses that neither Itkin, Marcus nor Freyberg ever knew or were aware of the plaintiff or had anything to do with him. The Grand Jury minutes of Freyberg's testimony (pp. 240-2) discloses that, in truth and in fact, Freyberg did not even have any dealings with Ralph Elyachar, the builder with whom plaintiff allegedly conferred on behalf of Melvyn Kaufman and to whom plaintiff allegedly caused a sum of money to be delivered, until after March 12, 1966, the date on which the Grievance Committee alleges that a sum of money changed hands. Thus, the evidence already in the hands of the Grievance Committee establishes that this plaintiff could not possibly have had anything to do with Freyberg, Itkin or, for that matter, James Marcus, as is suggested by the opposing papers, presumably in an effort to inflame the Court. Nowhere in Freyberg's testimony in the possession of the defendants is there any mention of the plaintiff. Freyberg did testify that he introduced Elyachar to Itkin and/or Marcus but this occurred during the Fall of 1966, long after plaintiff's dealings with Elyachar. Freyberg was suspended from practice for three years for lying to a Grand Jury about the 1966 kickback scandal involving Marcus and the Jerome Reservoir - not the matter charged against this plaintiff. Itkin was charged with bribing Marcus and

resigned from the bar. Plaintiff was clearly not involved with either of them although defendants imply otherwise. The opposing papers constitute a clear manifestation of defendants' lack of good faith in proceeding against this plaintiff some eight years after the events of which they complain.

5. The matters set forth in the charge letter annexed to the moving papers herein as Exhibit "A" have never resulted in any Grand Jury indictment or other criminal complaint. Significantly, the facts elicited before the Grand Jury do not even constitute a crime. However, they do represent a charge of unethical practice sufficient to warrant disciplinary proceedings including disbarment. They are predicated upon events which occurred in 1966. Nevertheless, it was not until February 4, 1971 (some five years later) that defendants procured the Grand Jury testimony underlying their proceedings against the plaintiff and it was not until January 11, 1973 (seven years after the operative events and two years after defendants procured the Grand Jury testimony) that defendants first initiated any inquiry concerning plaintiff's alleged unethical behavior. In these circumstances, it ill becomes defendants to contend that "further delay of the disciplinary proceedings would be detrimental" or that the public interest demands prompt action.

6. It was in 1967 that Federal and State Grand Juries heard evidence concerning the criminal activities of Michael Freyberg, Attorney Herbert Itkin and former New York City Water Commissioner, James Marcus. It was in February 1969, that Ralph Elyachar, a real estate man and builder, was charged

by a New York County Grand Jury with perjury in connection with Messrs. Freyberg, Itkin and Marcus. It was on December 18, 1967 that Itkin and Marcus were first indicted for bribery and kick-backs involving a New York City reservoir cleaning contract. The indictments of Itkin and Marcus and the events surrounding their criminal activities were widely publicized. The publicity which appeared in the New York Press made prominent mention of Michael Freyberg, Esq. Plaintiff was not prominently mentioned although his name did appear in one or two newspaper articles in February of 1969 in connection with the perjury indictment of Ralph Elyachar. The Grievance Committee took no action until February 4, 1971, when, according to Miss McDonald's affidavit, an order was procured from the Supreme Court, New York County, authorizing the New York County Grand Jury "to release the minutes of the 4th December 1967 Grand Jury in a matter entitled "People v. John Doe," the 5th June 1968 Grand Jury in a matter entitled "People v. Harry Hoe", and the 5th October 1968 Grand Jury in a matter entitled "People v. John Doe" to the Committee on Grievances of the Association of the Bar of the City of New York." The order releasing these Grand Jury minutes was procured at the behest of Francis J. Rogers, Assistant District Attorney in New York County, in connection with "inquiries involving a complaint against Michael Freyberg, an attorney..." Fortuitously and unbeknownst to plaintiff, his Grand Jury testimony was part of the testimony released to the Bar Association in the Freyberg affair. According to Miss McDonald's affidavit, the Bar Association proceeded against Michael Freyberg after his perjury conviction on December 17, 1970. Only testimony concerning Attorney Freyberg was sought and only

testimony concerning Mr. Freyberg was released by the Supreme Court to the Grievance Committee. A copy of the Court's order of February 4, 1971 releasing the subject Grand Jury testimony is annexed hereto as Exhibit "A" and made a part hereof. Upon examination of the testimony, the defendants discovered the plaintiff's testimony given under a grant of transactional immunity. Still, defendants did nothing until January 11, 1973, when defendants sent plaintiff the letter annexed hereto as Exhibit "B" and made a part hereof referring to a "newspaper article" in a vain attempt to afford legitimacy to their belated efforts. It is submitted that the defendants are not only violating plaintiff's Constitutional rights in attempting to use his Grand Jury testimony but that they are also violating New York law in attempting to use Grand Jury testimony released in connection with proceedings against Michael Freyberg and not with respect to plaintiff.

7. The pending disciplinary proceedings against plaintiff were thus instituted on the basis of tainted evidence on January 11, 1973. Confronted with this evidence the plaintiff clearly did not deny his sworn testimony but, rather, freely admitted what defendants already knew and sought to explain that he had no knowledge of Elyachar's activities or intentions, no knowledge of Itkin, Freyberg or Marcus and absolutely no intention to commit an illegal, improper or unethical act. This is the "voluntary" statement of April 26, 1973, referred to in paragraph 9 of Miss McDonald's affidavit. Certainly, if the defendants are not entitled to use the Grand Jury testimony elicited from plaintiff under a grant of immunity they can take no solace from the fact that plaintiff, when

confronted with that testimony, affirmed its accuracy. If defendants are barred from using immunized testimony, they are likewise barred from utilizing the fruits derived from the use of such immunized testimony.

8. It is indeed correct, as noted by Miss McDonald, that formal charges were made by defendants on May 31, 1973; that plaintiff answered those charges on June 13, 1973; and that a hearing on those charges was first held on June 21, 1973. The 1973 hearing resulted in a finding that the charges were sustained and further disciplinary proceedings were recommended. However, the 1973 proceedings were vacated in their entirety. Deponent, as substitute counsel for plaintiff, protested to the Chairman of the Committee on Grievances demanding that the prior proceedings be vacated and that they be started de novo by reason of the Committee's irregularities involving the denial to the plaintiff of fundamental rights of due process and specifically, involving the use by the Committee of plaintiff's immunized testimony before the Grand Jury. Miss McDonald's statement that a new hearing was granted "to allow plaintiff the benefit in the change of procedures of the Committee on Grievances not available to him at the time of the first hearing" is both misleading and unsubstantiated. No reason was ascribed by the Chairman of the Committee on Grievances for the grant of deponent's application on plaintiff's behalf for a new hearing. Moreover, the "procedures... not available" at the time of the first hearing relate to corrective actions taken by the defendants after deponent protested that the plaintiff and other attorneys similarly situated were being

denied their procedural due process rights under then existing practices of the Grievance Committee.

9. Proceedings were recommenced by the defendants on April 16, 1974 when a new "charge letter" was served. An answer to this charge letter was interposed and a new hearing was had at which Miss McDonald, as the prosecuting attorney for the defendants, offered the tainted Grand Jury testimony and deponent objected. The Panel of the Grievance Committee hearing the matter reserved decision after hearing argument and then overruled the objection. Only when the objection was overruled and the Grand Jury testimony was admitted into evidence before the Panel was this action instituted and the instant motion for a preliminary injunction sought. Thus, the only matter now before this Court is the propriety of deponent's objection in the 1974 proceedings and not the defendants' conceded violations of plaintiff's rights in connection with the 1973 proceedings.

DEFENDANTS ARE ESTOPPED BY
THEIR OWN LACHES FROM CON-
TENDING THAT FURTHER DELAY
IS DETRIMENTAL

10. It ill becomes defendants to urge Federal abstention on the grounds that delay of the pending disciplinary proceedings is somehow detrimental to the public interest. As indicated above, the defendants themselves delayed many years before bringing the instant proceedings. They knew of plaintiff as early as 1969 [Exhibit "B"] and were aware of Michael Freyberg's activities even earlier. Defendants contend that they waited, in the exercise of their own discretion, until after

Freyberg's conviction to seek evidence for a disciplinary proceeding against him. They apparently chose not to proceed solely on the basis of Freyberg's conviction but, rather, to embellish their prosecution of Freyberg with evidence procured from his Grand Jury testimony. This, they obtained in February 1971. Defendants waited another two years before making any inquiry in connection with the plaintiff's activities. They first inquired into plaintiff's activities in 1973. Another year went by before the second hearing was scheduled. In the light of these facts, it can hardly be said that the sudden claim of "public necessity" by defendants is now made in good faith.

11. It was the defendants who established their own priorities and determined that the plaintiff was the least important of the attorneys to be prosecuted for any connection, no matter how remote, with the Freyberg-Itkin-Marcus affair. Having made such a determination, defendants should not now be permitted to claim that time is of the essence.

12. Equally inapposite, is defendants' contention that the instant proceeding in Federal Court is premature. By virtue of Section 90 of the New York Judiciary Law and Rule 603.12 of the Rules of the Appellate Division, First Department, the Committee on Grievances of the Association of the Bar of the City of New York is the administrative arm of the State Court in connection with the prosecution and discipline of attorneys. As Miss McDonald points out in paragraph 23 of her opposing affidavit, the pending hearing before a Panel of the Committee is a necessary preliminary step in the process of disbarment, a patently punitive action which inexorably results

in the deprivation of an attorney's livelihood. The futility of awaiting the determination of the defendants and of the Appellate Division is manifested by the fact that, as Miss McDonald notes, the New York Court of Appeals has refused to recognize a lawyer's immunity from prosecution in a disciplinary proceeding based upon Grand Jury testimony elicited on the waiver of Fifth Amendment and Fourth Amendment rights. Moreover, a Panel of the Grievance Committee has previously found that the charges against plaintiff were sustained solely by reason of his Grand Jury testimony, otherwise immunized, so that it is unlikely that a second panel would come to a different conclusion. As clearly as night follows day and day follows night, if this Court does not intervene, the charges against plaintiff will be sustained and his Constitutional rights violated.

THERE HAS BEEN NO WAIVER ON PLAINTIFF'S
PART OF HIS RIGHT TO OBJECT TO THE USE
OF COMPELLED TESTIMONY

13. Defendants argue that plaintiff has waived his right to protest the infringement of his Constitutional rights by reason of the events which occurred in connection with the prior proceedings, now voided by the defendants themselves. This shocking contention ignores the fact that plaintiff was granted a de novo hearing before the Committee on Grievances which, in effect, "wiped out" any errors or omissions in these prior proceedings. More important, defendants' argument is legally untenable. If plaintiff is entitled to prevent the use of his compelled testimony in a disciplinary proceeding then he need not deny its very existence. If such testimony is immune or privileged, it simply may not be used for any purpose whether or not the plaintiff, under further compulsion, admits that such

testimony was given.

14. At the time plaintiff was first called before the Grievance Committee he was admonished that if he failed to "cooperate" with the Grievance Committee he would be subjected to discipline for that reason. Instead of appearing uncooperative, instead of perjuring himself, instead of denying the existence of the material already in the hands of his prosecutors, plaintiff sought to explain that nothing in his Grand Jury testimony related to any criminal act on his part or, for that matter, any unethical activity. In essence, his "detailed statement" of April 26, 1973 sought to refute the operative allegation in the charge letter that in March of 1966 plaintiff "believed that the means to be employed by Kaufman and Elyachar in delaying or blocking the Sommer application were to be illegal and that the money to be paid did not constitute a legal fee." While seeking to explain his lack of complicity and culpability plaintiff did, indeed, point out to the defendants that his testimony was compelled under a grant of immunity but this claim was brushed aside. These facts hardly constitute the waiver of any Constitutional privilege. They certainly do not constitute such a waiver in light of the fact that the prior proceedings were vacated.

15. It is indeed curious that Miss McDonald, in paragraph 28 of her opposing affidavit, argues that plaintiff "does not lose the right to press any objections he may have because of adverse rulings by a Panel of the Committee on Grievances..." while in paragraph 38 of her affidavit she contends "that even if his privileges against self-incrimination

were violated by use of his compelled testimony, he is now precluded from availing himself of his Fifth Amendment privilege since he has effectively waived the invocation of such privilege." The waiver is founded upon an alleged failure to properly object during the course of the prior proceedings which are now vacated and void, proceedings which Miss McDonald claims are not binding upon the Appellate Division. Deponent submits that the defendants simply cannot have it both ways.

PLAINTIFF WILL SUFFER IRREPARABLE INJURY
UNLESS THIS COURT GRANTS INJUNCTIVE RELIEF

16. It is clear that further proceedings before the Grievance Committee and before the Appellate Division will be fruitless insofar as plaintiff's Constitutional rights are concerned. The highest State Court has already made it clear that it will not recognize plaintiff's Constitutional rights so that only Federal intervention can assure plaintiff of any protection.

17. To permit these Bar Association proceedings to continue does not only result in a financial drain on the plaintiff but also has a chilling affect on his ability to practice law. The pendency of disciplinary proceedings while ostensibly secret, has become known to certain clients and adversaries to plaintiff's decided detriment. Defendants are well aware of this. The pendency of the disciplinary proceedings has cast a pall over plaintiff's activities on behalf of his clients and has consumed inordinate amounts of time and attention. In these circumstances, to subject the plaintiff to the obviously futile procedures set forth in paragraph 23 of Miss McDonald's opposing affidavit would constitute, in and of itself, punitive action.

18. Defendants have not acted in good faith in proceeding against this plaintiff. They have waited inordinate amounts of time before taking action. They have sought to utilize Grand Jury testimony obtained not only under a grant of immunity but as the result of a completely different inquiry. They have sought to use Grand Jury testimony not specifically released to them by the Court, as required by law. They proceeded initially against the plaintiff in a manner which denied him substantial rights of due process. They now proceed to obfuscate the real issues here by attempting to link plaintiff with Messrs. Freyberg, Itkin and Marcus knowing full well that plaintiff never had any connection with these persons and that the Grand Jury inquiry in connection with which plaintiff testified never resulted in any indictments relating to bribery or corruption of public officials.

19. Underlying all of the arguments of defendants herein is the specious proposition that somehow attorneys are sui generis and not entitled to the same Constitutional protections afforded other citizens. The patent injustice of such a proposition was recently noted by Attorney General William B. Saxbe in an interview on a National Public Affairs Center for Television broadcast. Commenting on the prosecutions of attorneys involved in the Watergate affair he remarked that:

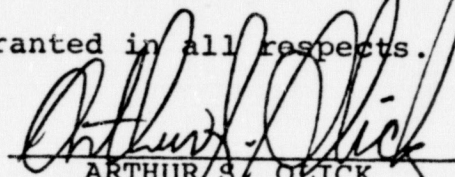
"... we are running the danger at the present time of cutting the cloth to fit on these cases and that we're using extralegal means, the threat of disbarment, the threat of exposure. Well, these are not legal and have no part in the proceedings in justice. We're using these to smoke people out and that we're using light sentences and we're using all kinds of inducements to make cases, and that we're walking the narrow line between really running a Justice Department or a justice system in this country and running a kind of kangaroo court where any ends -- any means justify the ends."

* * *

"I think that we walk that narrow line. And I have mentioned before that this idea of circumventing the Fifth Amendment by offering immunity and then trying to make them testify and then to prosecute them when they don't is a device that we should re-examine."
[Emphasis added].

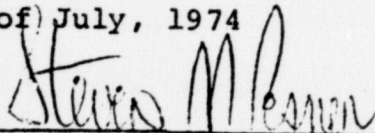
20. Here, plaintiff has committed no crime and has testified truthfully before a Grand Jury conducting an inquiry into the crimes of others. He did so under compulsion, waiving his 5th Amendment privilege under a broad and unlimited grant of immunity. Because he earns his livelihood as an attorney rather than in some other capacity, the District Attorney and the defendants would punish him for exercising his constitutional rights. This Court should not permit such manifest injustice.

WHEREFORE, deponent respectfully prays that the motion to dismiss the complaint be denied and that the motion for a preliminary injunction be granted in all respects.


ARTHUR S. OLICK

SWORN to before me this 2nd day

of July, 1974


Notary Public

STEVEN M. PESNER
Notary Public, State of New York
No. 31-4506981
Qualified in New York County
Commission Expires March 30, 1975

450
FEB 1971
I have read the foregoing
and certify that the same
are true and correct.
Notary Public
for the State of New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter

of

Authorizing the release of the minutes of :
the Fourth December 1967 Grand Jury in a :
matter entitled People v. John Doe, the :
Fifth June 1968 Grand Jury in a matter :
entitled People v. Harry Hoe, and the :
Fifth October 1968 Grand Jury in a matter :
entitled People v. John Doe to the Committee :
on Grievances of the Bar of the City of New :
York. :

ORDER

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WHEREAS, it appears from the affidavit of Francis J. Rogers, Assistant District Attorney, dated February , 1971, that the interests of justice would be furthered by releasing to the Committee on Grievances of the Association of the Bar of the City of New York the Grand Jury minutes of the Fourth December 1967 Grand Jury in a matter entitled People v. John Doe, the Fifth June 1968 Grand Jury in a matter entitled People v. Harry Hoe, and the Fifth October 1968 Grand Jury in a matter entitled People v. John Doe, all being inquiries involving a complaint against Michael Freyberg, an attorney, it is therefore hereby

ORDERED, that the District Attorney of the County of New York is hereby authorized to release the minutes of the Fourth December 1967 Grand Jury in a matter entitled People v. John Doe, the Fifth June 1968 Grand Jury in a matter entitled People v. Harry Hoe, and the Fifth October 1968 Grand Jury in a matter entitled People v. John Doe to the Committee on Grievances of the Association of the Bar of the City of New York

191 XCR
Justice of the Supreme Court

Dated: This day of February, 1971.

EXHIBIT "A"

COMMITTEE ON GRIEVANCES
OF
THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
36 WEST 44TH STREET
NEW YORK, N. Y. 10036

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JOHN G. BONOMI
CHIEF COUNSEL

—
DONALD EISENMAN
RICK J. MOYNIHAN
JUL W. PICKELLE
BERT L. RICHTER
ASSOCIATE COUNSEL

—
MICHAEL AMBROSIO
NATHAN E. CARNEY
DAVID A. COBIN
MARY McDONALD
ASSISTANT COUNSEL

ROOM 914
—
AREA CODE 212
MURRAY HILL 2-0608

January 11, 1973

PERSONAL

Re: Newspaper Article

This Committee is presently reviewing the conduct of certain attorneys who appeared before the Grand Jury of the Supreme Court of the State of New York, New York County, in 1968 relative to an investigation into the possible undue influence upon the New York City Planning Commission. The district attorney of New York County has forwarded to us the Grand Jury minutes relative to this matter and we have reviewed your testimony given before that body in October and November 1968. Please come to the office of this Committee at 2:30 P.M. on Thursday, January 25, 1973, bringing with you any files or other information you may have relative to this matter. We wish to discuss your testimony with you and you of course have the right to be represented by counsel at that time.

Very truly yours,

Mary McDonald
Assistant Counsel

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TRANSCRIPT OF THE JULY 3, 1974 HEARING ON THE
MCS MOTIONS FOR A PRELIMINARY INJUNCTION AND TO
DISMISS

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANONYMOUS,

Plaintiff,

vs.

THE ASSOICATION OF THE BAR OF THE
CITY OF NEW YORK.

Defendant.

74 Civ. 2398

Before:

HON. THOMAS P. GRIESA,

District Judge.

New York, July 3, 1974;
10.30 o'clock a.m.
(Room 906)

APPEARANCES:

ANDERSON, RUSSELL, KILL & OLICK, Esqs.,
Attorneys for Plaintiff;

BY: ARTHUR OLICK, Esq., and
STEVEN M. PESNER, Esq.,
Of Counsel.

MARY McDONALD, Esq.,
Attorney for Defendant.

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1 THE COURT: I don't understand why it took so
2 long to get the reply memorandum. Who is here for the
3 plaintiff?
4

5 MR. OLICK: I am, your Honor, Arthur Olick.

6 THE COURT: Mr. Olick, you had the defendants
7 materials about June 19.

8 MR. OLICK: That is correct.

9 THE COURT: Now I get, five minutes before the
10 hearing or at the time of the hearing, a reply memorandum
11 and a reply affidavit dealing with a question of law you
12 must have known was in the picture from the very beginning.
13 Why wasn't it given me before this? Why do we have a
14 hearing in a situation where I can't get prepared for it?

15 MR. OLICK: That is my fault, your Honor.
16 It is a matter, of course, involving an attorney and I have
17 been working very closely with the attorney involved here,
18 and every piece of paper has been gone over in great detail
19 over a period of time. I apologize to the Court for the
20 fact that it was delayed. We had not wanted to ask for
21 any further adjournments.

22 THE COURT: All right.

23 Do you deal in your papers with the Erdmann
24 case?

25 MR. OLICK: Yes, your Honor.

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1 THE COURT: Where is that dealt with? Where
2 is your discussion of Erdmann?
3

4 MR. OLICK: It is on page 8 of the reply brief.
5 (Pause.)

6 THE COURT: That only quotes that portion of
7 Erdmann characterizing the disbarment in a quasi-criminal
8 proceeding. Where is your discussion of Erdmann on the
9 abstention point?

10 MR. OLICK: With respect to the abstention point,
11 your Honor, the discussion of the doctrine of abstention
12 commences on page 11.

13 THE COURT: Where is the discussion of Erdmann
14 in that portion of your brief?

15 MR. OLICK: Erdmann specifically is not
16 discussed there.

17 THE COURT: Isn't that the most germane case on
18 the abstention point? That is a case dealing directly
19 with the question of whether there should be abstention
20 by a Federal District Court at the time of a disciplinary
21 proceeding in the New York State Courts.

22 How do you distinguish Erdmann from the present
23 case?

24 MR. OLICK: On the basis, your Honor, of the
25 decision of the United States Supreme Court two years ago

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1 in Steffel versus Thompson. In Steffel v. Thompson we
2 have the Court considering the --
3

4 THE COURT: What did Steffel v. Thompson deal
5 with?

6 Steffel v. Thompson dealt with this question of
7 abstention and distinguished between what is tantamount to
8 an administrative type proceeding, where the case has not
9 actually gotten into the courts and thereby removed the
10 requirement under Younger v. Harris, which the Erdmann case
11 looked to, of showing bad faith in the prosecution.

12 Since we are asking here essentially for a
13 declaratory judgment and injunction involving the action
14 of the Bar Association's Grievance Committee in a proceed-
15 ing that has not yet gotten to the Courts, we believe under
16 the doctrine of Steffel v. Thompson decisions like Erdmann,
17 which are predicated on prior law, are not applicable.

18 With respect to the doctrine of Federal
19 abstention it is our position that we do not have to demon-
20 state, although we think we have them inserted, bad faith
21 in terms of the prosecution of this case as well as the
22 substantial constitutional right. We are asking for
23 a declaratory judgment and injunction against the Bar
24 Association and the Grievance Committee from proceeding,
25 and under the Steffel v. Thompson doctrine unless there is

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2 a State Court criminal prosecution --

3 THE COURT: Do you have a copy of the Steffel
4 case with you?

5 MR. OLICK: I do not, your Honor. It is 410
6 U. S. 953. It may not be in the bound volume.

7 Our position on Federal abstention is that we do
8 not have here a Federal Court criminal prosecution for
9 purposes of abstention. I would draw this distinction.

10 THE COURT: The thing is that Erdmann in a sense
11 went off on two grounds. One was what Judge Mansfield
12 seems to have characterized a disbarment proceeding. Here
13 is what he says, and this in 458 Federal 2d 1209. He said
14 that:

15 "A Court's preliminary proceeding against a
16 member of its bar is comparable to a criminal matter
17 than to a civil proceeding,"

18 and then there is further discussion on page 1210 and he
19 quotes Ruffalo, the Supreme Court case, as stating that:

20 "Disbarment proceedings are of a quasi-
21 criminal nature,"

22 and he also, it seems to me, goes off on what really is an
23 independent ground in applying the Younger and that is that
24 the relationship between the State Courts and the attorneys
25 practicing before those Courts is a delicate one and one

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2 in which the State Courts have a particularly close
3 interest and where the Federal Courts should be very loathe
4 to interfere.

5 My law clerk called up and said the citation
6 you gave, 410 U. S. 953, is the granting of cert.

7 MR. OLICK: Tell him to look at 39 Law Addition,
8 2nd, 505.

9 THE COURT: We don't have it. Is it a 1974
10 case?

11 MR. OLICK: A 1974 case.

12 THE COURT: Tell the law clerk to look in Law
13 Week; that it is a 1974 case, Steffel v. Thompson.

14 MR. OLICK: If I may address myself to those
15 two points --

16 THE COURT: I'm not finished.

17 Judge Lumbard, it seems to me, very carefully
18 refrained from calling a disbarment proceeding a criminal or
19 quasi-criminal proceeding, and his ground for the applica-
20 tion of the abstention doctrine was stated at page 1213, and
21 he said:

22 "While these principles were stated in cases
23 involving straight criminal proceedings, I believe
24 that they apply with equal force to proceedings
25 regarding the conduct of members of the bar. Thus,

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when State Courts do initiate an inquiry into attorney's conduct they deal with a matter of such great importance to the State and its citizens that the Federal Courts should be as slow to interfere in these proceedings as in State criminal proceedings."

Now, in light of that I would like you to tell me what the facts were in Steffel against Thompson. I will get the case up here, but let's start analyzing that and see if it really undercuts the basic rationale of Erdmann.

MR. OLICK: Your Honor, first, it doesn't deal with an attorney per se.

THE COURT: What does it deal with?

MR. OLICK: I don't have the facts right here, but the gravamen of the decision was that in dealing with Younger v. Harris when you are faced with a constitutional issue under the Federal Constitution that the abstention doctrine is further limited by requiring that there be an actual State proceeding, not a proceeding preliminary to a State proceeding, not an administrative proceeding which leads to a State proceeding, but where there is a threat of such a State proceeding in the future and you are faced with an administrative determination, Younger v. Harris doesn't require that you abstain except for a showing of

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2 bad faith.

3 Now, there is a distinction that we make which
4 we think is important and it relates to what Judge
5 Mansfield was doing in Erdmann. It is true that in the
6 Ruffalo case in dealing with an attorney in a constitutional
7 issue the Court held that disciplinary proceedings were
8 quasi-criminal in nature. We believe that is correct
9 with respect to the merits of the constitutional claim and
10 we cite that case for that proposition. But that is in
11 a different context from the doctrine of abstention.

12 In the case of an abstention under the Steffel
13 doctrine and under the Dumbrowski v. Pfister doctrine,
14 despite Younger v. Harris, you have to show in order to
15 invoke the abstention doctrine that you have an actual
16 State prosecution. Where you don't have an actual State
17 prosecution abstention does not apply despite the fact that
18 on the constitutional issue, which is a separate issue,
19 we feel that the Fifth Amendment privilege is applicable
20 here because a disbarment is quasi-criminal for this
21 purpose.

22 THE COURT: I can see a possible distinction
23 depending on the purpose.

24 MR. OLICK: That is right.

25 THE COURT: The distinction, I thought, that was

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2 really made in the cases was that for the purposes of
3 abstention the proceeding would be treated like the
4 criminal proceeding in Younger. The same considerations
5 would apply, but for the sake of the Fifth Amendment it
6 would not be treated as a criminal proceeding. Anyway,
7 let's face the Younger problem first.

8 MR. OLICK: We are arguing just the reverse of
9 that.

10 THE COURT: I know that. Let me just take a
11 minute to read the Steffel against Thompson decision, if
12 you don't mind. Why don't you just sit down.

13 MR. OLICK: All right.

14 (Pause.)

15 THE COURT: One thing that is clear is that
16 Steffel against Thompson did not involve any administrative
17 proceeding preparatory to actual Court proceedings. It
18 involved a situation where people are told that they had to
19 stop distributing leaflets and if they didn't they would be
20 prosecuted under a State law, so they were in the position
21 of, as Justice Brennan, pointed out of being threatened
22 with criminal prosecution as an inducement to get them to
23 stop their activity; but there wasn't any actual prosecu-
24 tion in being which they could actually test, the activity
25 where there was the constitutional questions.

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2 I think that it does not undercut Erdmann at
3 all. I would feel bound by Erdmann.

4 MR. OLICK: There is another aspect.

5 Assuming, argumendo, that the Erdmann standard
6 remains and that the Court treats a disciplinary proceeding
7 as part of a State prosecution, nevertheless under the
8 Younger v. Harris doctrine as enunciated in Erdmann, there
9 is no Federal abstention it is demonstrated that there is
10 bad faith in the prosecution as well as a substantial
11 infringement of constitutional right. We maintain here
12 that there are sufficient facts to raise the question of
13 bad faith. The facts fundamentally, your Honor, are
14 these:

15 The operative facts involving this attorney's
16 activities took place in 1966. The grand jury testimony
17 took place in 1968. In 1968-1969 there were one or two
18 newspaper articles which actually mentioned the names of
19 the principals involved here and two of them I know of at
20 that time mentioned the name of this attorney. It wasn't
21 until 1971 that the Bar Association, in connection with
22 its investigation and subsequent disbarment proceedings
23 against Michael Freyberg, the former president of the New
24 York City Tax Commission, asked for grand jury minutes.

25 In 1971 the Court in New York County granted the

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1 application on an affidavit of Assistant District Attorney
2 Francis Rogers, who was the prosecutor in these investiga-
3 tions in connection with the matter of Mr. Freyberg, and
4 released the minutes involving the Freyberg investigations.
5

6 Apparently part of what was released was the
7 testimony of this particular attorney.

8 THE COURT: So that brought the name of this
9 particular attorney in 1971 to the attention of the Grievance
10 Committee?

11 MR. OLICK: That is true. Nothing happens
12 before 1973.

13 THE COURT: Is that bad faith in the sense of
14 those cases that follow Younger? What kind of bad faith
15 are they talking about? Isn't it bad faith in this
16 regard:

17 That if a plaintiff can prove that criminal
18 prosecutions aren't really being used in the normal, bona
19 fide sense of prosecuting somebody or what is regarded to
20 be a crime, but there is the use of multiple criminal
21 prosecutions, or extraordinary delay or something that
22 indicates that the criminal prosecutions are being used as
23 a weapon to, say, stop blacks from voting or as a weapon to
24 achieve some purpose beyond the normal enforcement of the
25 criminal laws, in my understanding that is the bad faith

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2 that the Courts are talking about; isn't that right?

3 MR. OLICK: That is what has happened in partic-
4 ular cases, but the bad faith here --

5 THE COURT: What is the Supreme Court talking
6 about when they are talking about bad faith in the context
7 of the Younger problem?

3 8 MR. OLICK: What they are talking about in terms
9 of bath faith is some extraordinary or different set of
10 circumstances that is not in the normal course of a
11 criminal prosecution.

12 THE COURT: Has anybody ever held that a two-
13 year delay in getting to a problem is a kind of bad faith
14 that the Supreme Court is talking about in the Younger line
15 of cases?

16 MR. OLICK: You never have to reach that case in
17 that situation in a criminal prosecution because you have
18 statutes of limitations. Here you have no statute of
19 limitations. It is not just a two year delay by any
20 means.

21 THE COURT: Is there any contention that the
22 Grievance Committee is doing anything here other than with
23 a motive to determine whether the man should be disciplined
24 or not? There is is indication that this is being done
25 for a corrupt purpose or motive. That doesn't appear on

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its face, such as for some personal vindictiveness or hurting the man politically.

MR. OLICK: Not by reason of any political activities, his race, color, creed, national origin or anything of that kind.

THE COURT: Nor any personal vindictiveness.

MR. OLICK: What has happened here is the fact that what was adduced in the entire investigation led only to perjury indictments of other people. No crimes were committed. This particular individual was not in any way linked -- the grand jury testimony not only of himself but of Mr. Freyberg and others discloses he wasn't linked and he didn't know Marcus, Itkin or the rest of these people. He wasn't involved with them at all. In fact, the Marcus-Itkin affair was after the facts involving him. It just happened that one of the persons he dealt with later was put in touch with Marcus-Itkin and that is how the whole thing developed. He hasn't been accused of any crime. Nobody who was involved with him was accused of any substantive crime, only perjury, and then, when they refused to tell about it, then they went all these years before coming after him. They knew about this in 1969. They didn't even get his testimony under proper sources. Just incidentally the order involves Freyberg.

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1 THE COURT: Did the Grievance Committee have his
2 name before they got the testimony in 1971?

3 MR. OLICK: They say in their charge regarding
4 the newspaper article that the only newspaper articles
5 were dated no later than 1969 that had his name. They
6 must have had his name before then. There isn't a news-
7 paper article in the country we can find later than 1969.
8 There were only two in New York at the time that ever
9 mentioned his name. They say, "Re newspaper article."
10 They didn't do anything until 1973.

11 THE COURT: Did they have the newspaper article,
12 consider that there was a disciplinary offense, and then
13 intentionally delay?

14 MR. OLICK: Your Honor, it is impossible to show
15 that they intentionally delayed.

16 THE COURT: A newspaper article is now used by
17 them as some part of the charges, but you are talking about
18 bad faith.

19 Do you claim that they have been considering this
20 matter since 1969 as to your client and have intentionally
21 deferred it until 1973; is that what you are claiming?

22 MR. OLICK: I am not claiming an intentional
23 delay because I don't know, but I submit that it is bad
24 faith even if it is negligent delay.
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2 THE COURT: But you don't claim that they
3 actually focused on this matter until at least 1971 when
4 they got the grand jury testimony, do you?

5 MR. OLICK: I don't know what they did between
6 1969 and 1971.

7 THE COURT: All right.

8 MR. OLICK: But from 1971 to 1973 they had the
9 grand jury testimony. They waited another two years.

10 THE COURT: Let's get to the period 1971 to
11 1973. Let's assume that they really for one reason or
12 another didn't focus on the matter until 1971 or some time
13 when they were reviewing this grand jury testimony.

14 What is the bad faith in waiting until 1973?
15 Didn't they go ahead with a couple of others first?

16 MR. OLICK: The only one they went ahead with
17 was Mr. Freyberg.

18 THE COURT: Right.

19 MR. OLICK: They waited until Mr. Freyberg was
20 convicted of perjury for his testimony before the grand
21 jury. They asked for his testimony before the grand jury
22 and the testimony involved in the Freyberg matter, and they
23 got the testimony which included apparently this attorney as
24 well. They then proceeded against Mr. Freyberg who
25 had --

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2 THE COURT: This is in 1971?

3 MR. OLICK: Yes. They then proceeded against
4 Mr. Freyberg and there was nothing to stop them from
5 proceeding against this attorney as well because nothing
6 involved in the Freyberg matter related to the events
7 charged against this attorney. Mr. Freyberg isn't even
8 mentioned in the testimony of my client because he never
9 met him, he never knew him, and they know that because even
10 in Mr. Freyberg's testimony before the grand jury, which
11 they have made available, there is no reference to these
12 particular events with which this attorney is charged.

13 They then wait two years, from February
14 4th, 1971 to January of 1973, before pursuing this attorney.

15 There is no statute of limitations as such, but
16 I submit to this Court that it is bad faith to delay that
17 long. If this man is a threat of any kind, if there is
18 unethical practice, there must be some rule of diligence,
19 of proceeding promptly against him. There isn't.
20 They could have waited another 10 years and come against
21 him. This charge, already in 1973 --

22 THE COURT: Did you represent the plaintiff in
23 the proceedings that were commenced last year before the
24 Association of the Bar?

25 MR. OLICK: I did not.

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2 THE COURT: Why is it you did not disclose those
3 proceedings to me in your original affidavit? What did
4 you think would happen? Did you think I wouldn't have
5 my attention called to those?

6 MR. OLICK: Your Honor, the 1973 proceedings
7 on my position were vacated for a whole series of irregu-
8 larities which we characterized as denials of due process
9 rights. The Bar Association saw fit to vacate those
10 proceedings.

4
11 THE COURT: Why did you not mention those
12 proceedings in your affidavit?

13 MR. OLICK: Because I didn't think it was fair
14 to mention them because they had been vacated and wiped out.
15 I didn't want to come into court and attack the Bar
16 Association for things they had corrected. They gave
17 my client an entirely new hearing and corrected --

18 THE COURT: We have been talking about time.
19 Isn't it relevant, extremely relevant, to have me know all
20 of the facts about what happened beginning in the spring of
21 1973?

22 MR. OLICK: Yes, but that argument only relates
23 to Younger v. Harris, and until the doctrine of abstention
24 was raised as a defense that wasn't at issue and all those
25 facts are in the papers that are now before you.

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I did not want to attack the Bar Association for any kind of bad faith, even laches or delay.

THE COURT: On what grounds did you persuade the Bar Association to grant a rehearing? Is that a matter of record in anyway?

MR. OLICK: It is a matter of record before the Bar Association. I have no hesitancy in telling your Honor. I didn't bring it before the Court because they have corrected it. It is in three specific --

THE COURT: What was it?

MR. OLICK: No. 1, at the hearing the chairman of the Grievance Committee appeared. He had not been scheduled to be on the panel and he walked into the room. He sat down and said, "If you don't mind, I am going to sit on this panel," Mr. so-and-so attorney "and your counsel here. I know I am not scheduled. If you have no objection, I would like to appear. By the way, I know I have one matter with your office, Mr. Attorney. Do you object?"

It happened suddenly. The fact of the matter was there were three or four other matters of which the chairman apparently was not aware which had not been disclosed, which were even more material. That was one of the issues.

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1 THE COURT: One of the issues was whether the
2 claim should sit, actually sit on the panel. He actually
3 sat on the panel. Of course, the rules of the Bar
4 Association give every attorney in a grievance proceeding
5 a right to challenge both for cause and peremptorily.
6

7 That was decided?

8 MR. OLICK: Yes, that was taken care of.
9 We got a new hearing.

10 The second ground was that in the charge letter
11 it was the practice of or has been the practice of the
12 Grievance Committee that if there have been any prior
13 proceedings going back 10, 15, 5, 4, 3, any number of
14 years, in the accusations, that is put right at the begin-
15 ning. It is as if in an indictment in a criminal case
16 the indictment charged that in 1922 he was convicted of
17 grand larceny; in 1952 he was charged with such and such
18 and was admonished. It is all put in.

19 Our contention was that this is a denial of due
20 process because it prevents a fair adjudication of the
21 particular charges. That is no longer the practice of
22 the Grievance Committee. It is not in this case. That
23 had been done previously.

24 The third major ground --

25 THE COURT: I don't understand the significance

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2 of that. Are you saying that you contended before the
3 Grievance Committee that there were things that should --

4 MR. OLICK: Should not have been in the charges,
5 which were put in the charges, and which by putting them in
6 the charges in the prior hearing --

7 THE COURT: Old matters?

8 MR. OLICK: Old matters not relating to the
9 particular charges. They have changed this practice.

10 THE COURT: What was the third ground?

11 MR. OLICK: The third was this particular item
12 of the use of the grand jury testimony. There is no
13 written decision of the Grievance Committee. I don't
14 know on what specific grounds they vacated the prior hear-
15 ings.

16 THE COURT: This was the ground that you presented?

17 MR. OLICK: Yes, I presented these three grounds.

18 THE COURT: What did you specifically object to?
19 As I understand it, the three things happened at one time
20 or another in the first proceedings before the Grievance
21 Committee.

22 One, the plaintiff's grand jury testimony was
23 received.

24 MR. OLICK: Yes.

25 THE COURT: Second, the plaintiff filed a

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2 lengthy written statement before the formal hearing; right?

3 MR. OLICK: Yes.

4 THE COURT: And third, he actually testified in
5 the formal hearing: right?

6 MR. OLICK: Yes.

7 THE COURT: What was the nature of your objection
8 to the Grievance Committee on this subject specifically?

9 MR. OLICK: On this subject the objection was
10 that all of that testimony and the fruits thereof is
11 immunized by the grant of transactional immunity in the
12 State Court proceedings.

13 THE COURT: In other words, your objections --

14 MR. OLICK: The same ones I am raising here on
15 the substance.

16 THE COURT: I assume your objection is to even
17 have the proceeding at all amounts to unlawful fruit of the
18 unlawful use of the immunized testimony?

19 MR. OLICK: Not quite. It is quite conceivable
20 that the Bar Association could have independent evidence
21 not derived from the grand jury minutes. It is only the
22 grand jury minutes and the transactions related therein --
23 there may be other things in other evidence. I have never
24 seen any and, frankly, I don't think they can develop any,
25 but anything derived from the transactions stated in the

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2 grand jury minutes for which he was granted transactional
3 immunity and the fruits thereof we claim is constitution-
4 ally privileged.

5 THE COURT: You are objecting to having a hearing
6 as such; right?

7 MR. OLICK: No. I am objecting to the evidence.

8 THE COURT: You are objecting --

9 MR. OLICK: Their use of the grand jury hearing
10 and the evidence derived therefrom to prove their case.

11 THE COURT: What evidence do you claim is
12 derived therefrom? I want to get this clear.

13 MR. OLICK: They can't prove their case any other
14 way. I am claiming transactional immunity under New York
15 law. That is what he got. That is the broadest type
16 of immunity. I don't think they have any other basis
17 to proceed against him. I know of nothing. I don't
18 think I know of anything.

19 THE COURT: You would certainly object to the
20 use of the grand jury testimony?

21 MR. OLICK: Yes.

22 THE COURT: Let's suppose they began asking the
23 plaintiff questions based upon the information the got from
24 the grand jury testimony. You would object to those
25 questions?

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1 MR. OLICK: Yes, your Honor. My point is that
2
3 if a man is given immunity before the grand jury he walks
4 out and the press asks him "What is it all about?"

5 He can tell them what happened and he will still
6 be immunized. He hasn't waived his privilege. If he
7 is immunized, he is immunized. If you grant someone
8 immunity he has immunity from prosecution against those
9 transactions. It is not imposed upon him that he remain
10 secret about them.

11 In this case they didn't go out and talk to the
12 press. They brought the man in and said, "We have your
13 grand jury testimony. We know all about that. There
14 it is."

15 He said, "How can you use that?" They cited
16 New York law. New York law will not recognize this
17 constitutional right. It is futile to go through the
18 New York procedures and practice. We know positively what
19 the New York Courts have done with this until the Supreme
20 Court or the Federal Courts, which I submit to your Honor
21 are the best interpreters and holders of the Federal
22 constitutional rights, and I believe that is this Court's
23 function to interpret and apply Federal constitutional law,
24 despite the State's. Until that happens there is no
25 point in going through the State Court proceedings. We

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1 know precisely what the State Courts will do. They have
2 considered this point many times. I don't believe when
3 the Supreme Court will ultimately get an appeal from the
4 decision of the State Courts on a matter of this sort or
5 when a Federal Court's State position will be sustained.
6

7 Other States have now gone the other way.
8 The Federal doctrine is developing daily. I am dealing
9 here with a particular attorney who is fighting for his
10 livelihood.

11 THE COURT: He was represented by counsel?

12 MR. OLICK: Yes.

13 THE COURT: It was a different counsel?

14 MR. OLICK: Yes.

15 THE COURT: They did not raise the point you are
16 raising?

17 MR. OLICK: They raised it informally, not on
18 the record. It was a matter of discussion. It was
19 not raised on the record. Miss McDonald knows how it was
20 raised.

21 I submit that that doesn't preclude us from
22 raising it when the hearing has been vacated. Moreover,
23 I submit that even if that hearing was before the Court and
24 had gone up, there is not a waiver because a waiver of a
25 constitutional right must be clear, explicit and intentional

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2 and not just inadvertent.

3 Here we have had a reversal. It is tantamount
4 to having a trial before a *nes prius* court. Even if you
5 are reversed, you can still go back and raise your objection.
6 It is a *de novo* trial. That is what we have here.

7 THE COURT: Was this one of the grounds?

8 MR. OLICK: It was one of the grounds. I don't
9 know on what grounds the Bar Association granted my applica-
10 tion. I am very pleased that the two prior, what I call
11 mistakes or denials of his rights, have not been repeated.
12 I am delighted that is not before the Court. His rights
13 are now protected. But when I talk about a two-year
14 delay I am going back to 1973 in January. They had the
15 minutes in 1971. The first proceeding, the first charge
16 letter, the charge inquiry -- it wasn't even a charge
17 letter -- was in January 1973. That is when they first
18 called him in. The events took place in 1966. You can
19 imagine the reaction of the attorney all these years after
20 this occurred.

21 THE COURT: Your point about it being fruitless
22 to go through the New York Courts because you say it is a
23 foregone conclusion --

24 MR. OLICK: The cases are legion and modern.

25 THE COURT: Let's assume that in general, just

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1 assume for purposes of discussion so that we can get this
2 to this point, that the doctrine of abstension would
3 normally apply here. What I want to try to get to is
4 this:
5

6 Is there any relaxation of that doctrine simply
7 because the conclusion of the State Court would be foregone?
8 I don't know of any such relaxation.

9 Have You got a case on that?

10 MR. OLICK: No, I do not.

11 What the Courts have done In many cases is drawn
12 the distinction between actual criminal prosecution. They
13 have looked at in terms of the stage at which the proceedings
14 are brought.

15 In the Tang case, for example, in the Second
16 Circuit, it went off on the issue the State Court had
17 already decided the constitutional issue which was res
18 adjudicata and they wouldn't let the Federal Court inter-
19 vene because the State Court had decided that, and you had
20 to go through that procedure. You had to follow the
21 ordinary procedure. You have got to do this. You have
22 got to raise your Federal constitutional issue in a Federal
23 Court at the proper time, even that, or you have to go
24 through the route of applying for certiorari. We submit
25 we don't at the very inception of the proceeding.

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2 THE COURT: The choice is whether you are
3 supposed to go the route of the State Court and then
4 certiorari, and then whether you can come into the Federal
5 Court.

6 I gather that the identity of this plaintiff
7 was not revealed beyond the confines of the Bar Association
8 proceeding of what went on in 1973; is that right?

9 MR. OLICK: Not officially. Unfortunately
10 there have been several instances where the question has
11 been raised in courts with his clients. The information
12 has gotten out. How, I do not know. I cannot charge
13 the Bar Association.

14 THE COURT: Are those things supposed to be
15 officially confidential?

16 MR. OLICK: Officially they are.

17 MISS McDONALD: And they were confidential.

18 MR. OLICK: The only people who know about it
19 are the people on the Bar Association Grievance Committee,
20 counsel --

21 THE COURT: But at least as far as what the
22 intention is, the intention is to have those things con-
23 fidential?

24 MR. OLICK: Yes.

25 THE COURT: Let's suppose that a matter does get

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2 through the Grievance Committee at the Bar Association
3 and is referred to the Appellate Division and they start
4 their proceedings.

5 Now, the proceedings in the Appellate Division,
6 are they public or are they confidential?

7 MISS McDONALD: Likewise confidential according
8 to Section 9-D of the New York State Judiciary Law.

9 THE COURT: When does it become public?

10 MR. OLICK: When the Appellate Division approves
11 or disaffirms a Referee's report unless the Appellate
12 decides to keep it confidential.

13 Is that right?

14 MISS McDONALD: That is right.

15 THE COURT: The Appellate appoints a Referee?

16 MR. OLICK: The Bar Association holds a hearing
17 and if they recommend that the matter go further -- they
18 can admonish, dismiss or recommend that the matter goes
19 further. If that is approved by the Executive Committee
20 it then goes to the Appellate Division.

21 The counsel for the Grievance Committee normally
22 acts as prosecutor. The Appellate Division appoints a
23 Referee or Hearing Examiner to take testimony. He then
24 makes a report to the Appellate Division and the Appellate
25 Division makes a determination based on his report and

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2 recommendation.

3 THE COURT: Let's focus for a minute on some-
4 thing I would like to ask Miss McDonald.

5 Is there a statutory authorization for the
6 activity of the Bar Association Grievance Committee?

7 MISS McDONALD: Yes, there is. It is also in
8 Section 9-D of the Judiciary Law.

9 THE COURT: What part of Section 9-D?

10 MISS McDONALD: I am not sure of the subsection.
11 It is also found in 603.12 of the Appellate Division Rules,
12 First Department.

13 THE COURT: Have you looked at Section 90?
14 You cited it. Would you direct my attention to what that
15 part talks about? Either the Bar Association expressly
16 or something that would authorize the use of that type of
17 organization.

18 (Pause.)

19 MR. OLICK: While she is checking that, your
20 Honor, I can point out that we cite at page 11 of our
21 reply, Rule 603.2 of the Appellate Division rules of the
22 First Department. We specifically mention the Association
23 of the Bar and two cases which have laid out the authority
24 of the Grievance Committee. They are cited on page 11.

25 THE COURT: Page 11 of what?

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MR. OLICK: Of our reply brief.

MISS McDONALD: The specific designation is in the Appellate Division Rules and it is noted in Subsection 8 of Section 90 when it discusses who may appeal from the decision of the Appellate Division. It indicates that a petitioner, who may be a Bar Association -- indicating that Bar Associations are the petitioners in these types of cases -- but for the First Department the Appellate Division specifically names The Association of the Bar of the City of New York.

THE COURT: I am a little at a loss because I haven't read the papers that were given to me this morning. I had hoped to put a decision right on the record, but I certainly want to read the reply papers.

What is the problem about the schedule? The Bar Association is now retrained from going forward; is that right?

MISS McDONALD: That is true.

THE COURT: With an order signed or really on consent until the hearing and a determination of this motion -- what would be the desire of the Bar Association as far as their scheduling?

MISS McDONALD: At the present time our hearings have been suspended for a summer recess, so even if we

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2 were to proceed against the plaintiff on independent
3 evidence other than his grand jury testimony, it probably
4 would not take place until September or October, when the
5 Committee reconvenes.

6 THE COURT: On that point, the plaintiff's
7 original affidavit said, Paragraph A, page 3:

8 "Miss McDonald further advised deponent that
9 she would rest her case against the plaintiff on his
10 grand jury testimony."

11 Before You had his written statement and you had
12 his actual testimony at the hearing; right?

13 MISS McDONALD: That is correct.

14 THE COURT: Did you not intend to use any
15 of those materials or did you not intend to try to call
16 him?

17 MISS McDONALD: We did not intend to use the
18 transcript of the first hearing in which he testified and
19 was cross-examined. We did intend to use his April,
20 1973 statement as rebuttal evidence.

21 THE COURT: How did he happen to testify?
22 Did he come and testify in his defense, so to speak?

23 MISS McDONALD: You mean prior to the first
24 hearing, during the investigatory stage?

25 THE COURT: There was an investigatory stage.

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2 The first thing he did was to file a written statement
3 in lieu of being interviewed, didn't he?

4 MISS McDONALD: That is correct.

5 THE COURT: Then you had a hearing?

6 MISS McDONALD: We had a hearing.

7 THE COURT: Did he come voluntarily?

8 MISS McDONALD: Voluntarily. He testified
9 in his own behalf and he was cross-examined.

10 THE COURT: You don't have any subpoena power,
11 do you?

12 MISS McDONALD: We do have subpoena power.
13 The Appellate Division authorizes our subpoenas.

14 THE COURT: Let's suppose a man who is under
15 investigation by the Grievance Committee, an attorney, says,
16 "I don't want to testify."

17 Do you sometimes subpoena him and --

18 MISS McDONALD: Oh, yes, that happens quite
19 often, and once, assuming that he abides by the subpoena,
20 he does appear he may assert his Fifth Amendment privilege,
21 and I was advised by Mr. Olick that his client in the
22 second hearing would invoke his Fifth Amendment privilege.

23 THE COURT: Let's see about your intentions.
24 Actually there has been no hearing yet at all.

25 MISS McDONALD: There has only been an intro-

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2 duction. At that time the charge letter and the
3 plaintiff's answer were introduced into evidence.

4 THE COURT: Did the charge letter and then
5 his -- was there an answer filed in this proceeding?

6 MISS McDONALD: Yes, there was. There was an
7 answer filed. Those were introduced.

8 THE COURT: Is that part of this record?

9 MISS McDONALD: I don't believe it is.

10 THE COURT: Shouldn't I have that?

11 MR. OLICK: I will submit it. The operative
12 allegations of the charge letter are denied. There is
13 no narrative.

14 THE COURT: In other words, he didn't make a
15 written statement?

16 MR. OLICK: No, he did not.

17 THE COURT: So it is basically a denial?

18 MR. OLICK: Yes, basically it is a denial, your
19 Honor.

20 I would just like to point whereas what Miss
21 McDonald says about an attorney is correct, that is,
22 about an attorney not being compelled to testify and to
23 invoke his rights, I would point out to the Court that
24 attorneys are often cited and disciplined for failure to
25 cooperate with the Committee, so that they do have that

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2 hazard. If you refuse to cooperate, that is a disciplin-
3 ary offense.

4 THE COURT: Let's get the chronology. In this
5 current proceeding there was the charge letter and an answer
6 in the form of, basically, a denial without any affirmative
7 statement; right?

8 MISS McDONALD: Correct.

9 THE COURT: Then on --

10 MISS McDONALD: May 14.

11 THE COURT: On May 14?

12 MISS McDONALD: Yes, 1974.

13 THE COURT: Or is it the May 7 date?

14 MISS McDONALD: I stand corrected. May 7
15 was the original date for the hearing. The panel was
16 convened. Mr. Olick appeared on behalf of his client.
17 The hearing was commenced. We introduced the charge
18 letter and the answer and offered into evidence a tran-
19 script of the plaintiff's grand jury testimony. At that
20 time argument was heard for and against the entry of that
21 evidence and later briefs were submitted by both sides.

22 Approximately 10 days later the Chairman of the
23 panel, after polling the members of the panel, advised me
24 that the grand jury minutes would be received into evidence,
25 and the hearing was rescheduled.

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2 THE COURT: And it was rescheduled for the June
3 4 date?

4 MISS McDONALD: Correct.

5 THE COURT: What I would like to get from you
6 is this:

7 If the hearing had been continued on June 4
8 or if it was to be continued at any time now, what would
9 you intend to do as far as a case. You, of course, will
10 introduce the grand jury testimony which is now admissible
11 by the Grievance Committee.

12 MISS McDONALD: Right.

13 THE COURT: Do you intend to do anything else?

14 MISS McDONALD:: Originally I had intended not
15 to put in any other evidence as part of our affirmative
16 case and I intended to use the plaintiff's April 1973
17 statement as rebuttal evidence. However, at that initial
18 hearing where argument was heard and the introduction of
19 the minutes, a panel member posed a question to Mr. Olick,
20 such as this:

21 If your client does appear here will he invoke
22 his Fifth Amendment privilege; will he refuse to testify?

23 Mr. Olick said, "Yes."

24 That changed the complexion of things. After
25 hearing that it would be my intent to put the 1973 statement

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2 in as part of our affirmative case.

3 THE COURT: In other words, I gather from the
4 colloquy that the lawyer would not put on any case of his
5 own; right?

6 MISS McDONALD: Correct.

7 THE COURT: He wouldn't come and testify?

8 MISS McDONALD: Or he would come and invoke
9 his Fifth Amendment privilege.

10 THE COURT: If you subpoenaed him; right?
11 You did not, I take it, after the colloquy intend to
12 subpoena him and ask him to testify?

13 MISS McDONALD: No, it was my belief that he
14 was going to voluntarily appear and invoke his Fifth
15 Amendment privilege. If I thought for some reason he
16 was not going to appear at all, I would have subpoenaed him,
17 so it would be on the record that he invoked his privilege.
18 His non-cooperation with our Committee would fall into the
19 realm of not even showing up, ignoring us completely, not
20 coming and invoking his privilege: but if they cooperate
21 to the extent that the respondent, the defendant in the
22 proceeding appears, and then invokes his Fifth Amendment
23 privilege, that is not cooperation with our Committee.
24 He is invoking a privilege that is available to him.

25 THE COURT: He gets notice of a hearing and

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2 presumably he would normally be expected to say something?
3 In other words, you would normally expect him to come
4 without a subpoena; right?

5 MISS McDONALD: Yes. On certain occasions a
6 lawyer might not.

7 THE COURT: So, then, if he does not come you
8 usually subpoena him; right?

9 MISS McDONALD: We subpoena him or just proceed
10 without him, and in a case where an attorney would not
11 appear at a disciplinary proceeding it is usually the
12 conclusion that the matter should be referred to the
13 Appellate Division for further prosecution.

14 THE COURT: I think we are getting into too many
15 fine points here. Let me just go back. This may be
16 repetitious.

17 Your original thought was to introduce the grand
18 jury testimony.

19 MISS McDONALD: Right.

20 THE COURT: This would be the kind of case where
21 you would expect him, if he was cooperating, to come and
22 testify; right?

23 MISS McDONALD: Correct.

24 THE COURT: And you expected that to happen with-
25 out a subpoena; right?

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MISS McDONALD: Right, yes.

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THE COURT: Now, then, after the colloquy you realized that whether he came with a subpoena or without a subpoena he would simply invoke the Fifth Amendment?

6

MISS McDONALD: Yes.

7

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THE COURT: Then you decided as to the April, 1973 written statement which you had originally intended to use on rebuttal, you would now use as part of your direct case?

11

MISS McDONALD: Correct.

12

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THE COURT: Were you intendint to use the testimony, to try to introduce the testimony that he had given in the earlier hearing?

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MISS McDONALD: Definitely not. We went to great extremes to immunize the panel hearing the case from all knowledge of that 1973 proceeding.

18

MR. OLICK: Correct.

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THE COURT: One final question:

If a lawyer comes and invokes the Fifth Amendment and you believe that that is for some reason improper, do you have any power to direct him to answer? Do you have contempt power?

24

MISS McDONALD: No.

25

THE COURT: Your only sanction is to treat it as

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a consideration in connection with --

MISS McDONALD: Not even as a consideration.

According to Spivak versus Klein, an attorney may in a disciplinary proceeding invoke his Fifth Amendment privilege and no advse --

THE COURT: Supposing the attorney has been immunized, this raises another question I thought you were getting at in your brief. I thought you were drawing a distinction between two problems about privilege against self-incrimination, one where the privilege is allowed to be invoked in an administrative proceeding because of the possible use of the testimony in subsequent criminal proceedings. Let's put that as problem No. 1. That, I guess, was the problem in Garrity and the Sanitation Men's case; right?

MISS McDONALD: Correct.

THE COURT: Now, another problem is where an attorney comes into the administrative proceeding and he wants immunity strictly to protect himself against the administrative proceeding. I don't suppose he would ever say it that way, but that would -- you can certainly have -- you have a different problem if you are worrying about whether he should be immunized from the sanctions of the administrative proceeding and whether he would be

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2 immunized from future criminal prosecution.

3 As I understand Zuckerman and Klebanof, there
4 is no right to invoke the privilege against self-
5 incrimination to protect yourself against the disciplinary
6 proceedings; right?

7 MISS McDONALD: Correct.

8 THE COURT: Let's suppose that a lawyer comes
9 in who has been given immunity from criminal prosecution,
10 as in this case, and I think as in the Klebanoff case, and
11 so there is no realistic possibility of the use of this
12 testimony in criminal proceedings against him. But he is
13 then asked to testify before the Bar Association's
14 Grievance Committee and he invokes the privilege, the
15 Fifth Amendment privilege.

16 Now, does the Grievance Committee have any
17 procedure to determine the validity of his claim of privilege
18 and to deal with him if it believes that his claim of privi-
19 lege is invalid?

20 MISS McDONALD: Well, that particular problem
21 has never presented itself to the Grievance Committee because
22 in cases where the individual, an attorney, has already been
23 granted immunity, we have in our possession the transcript
24 of his grand jury testimony given under immunity which
25 generally implicates him in wrongdoing. We don't need

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the attorney to actually take the stand and testify further.

THE COURT: So the answer to my question would be that you haven't had the occasion to think in terms of applying sanctions against him in that instance?

MISS McDONALD: Correct. It has never been necessary. That situation could in the future certainly arise, but to date it has not been necessary to have any contempt proceeding initiated against the attorney to attempt to force him to testify.

THE COURT: Going back to the point of your intention in this proceeding, if it had gone on or would go on in the future, you would now and would have on June 4 introduced the grand jury testimony, introduced his prior written statement, and you would rest?

MISS McDONALD: Correct.

THE COURT: You don't have any independent evidence, so to speak, or other evidence to be presented against him, do you?

MISS McDONALD: At this point we do not have any concrete independent evidence because it has not been necessary for us to pursue it. However, we do feel that we have two strong leads on the obtaining of independent evidence. These include two individuals who were links also in this chain; that the plaintiff was also a link with

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2 the individual before him and the individual after him,
3 both of whose testimony before the same grand jury
4 implicated the plaintiff in a scheme.

5 THE COURT: Was the immunity granted use or
6 transactional?

7 MR. OLICK: Transactional, the broadest kind of
8 immunity. Unlike the Federal Court, the State statutes
9 don't make the distinction between use and transactional.

10 THE COURT: You quoted the granting of immunity
11 and said you cannot be prosecuted for any State violation
12 as a result of your testimony here today.

13 MR. OLICK: That is what he was told, but there
14 is only one immunity and that is transactional immunity.

15 THE COURT: Is that right?

16 MISS McDONALD: I'm not sure of that.

17 THE COURT: Would that bar the Grievance
18 Committee from going out and getting independent evidence?

19 MR. OLICK: If the leads were derived from the
20 grand jury testimony, which was compelled under the grant
21 of immunity, yes.

22 THE COURT: But if the leads were derived from
23 other sources besides the grand jury testimony it could be
24 followed up and used; right?

25 MR. OLICK: Yes, and I have no objection to that.

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1 THE COURT: As things stand now, would your
2 intention be to follow those leads, or are you going to wait
3 for the decision of this Court?
4

5 MISS McDONALD: I hope that we would have a
6 speedy decision here so that we know what is before us,
7 whether we have to proceed with these leads. My own feel-
8 ing is that these witnesses are going to be hostile. They
9 are individuals who have already been convicted of the crime
10 of perjury relative to this whole scheme. It will no
11 doubt be an involved process and might involve the contempt
12 proceeding to obtain the information that we wished to obtain
13 from these individuals. It might be an unnecessary task
14 and at this point we have simply been awaiting a decision
15 from this Court.

16 I will reserve decision.

17 MISS McDONALD: There are few points that I
18 would like to be heard on.

19 THE COURT: All right.

20 MISS McDONALD: First of all, as we have con-
21 tended, we feel that the Erdmann case is applicable to our
22 situation. The only difference, as Mr. Olick has pointed
23 out, is that the prosecutors in the Erdmann case where the
24 Appellate Division justices themselves and in our particular
25 case we have been appointed, the Grievance Committee has

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2 been appointed prosecutors in such situations by the
3 Appellate Division. In other words, we are one step
4 removed from the Appellate Division itself, but we are the
5 arm of the Appellate Division in this regard.

6 We contend that no distinction should be made;
7 that we are following an administrative function whereas the
8 Appellate Division would be following a judicial role.

9 It has been held in the Federal cases that the
10 Association of the Bar proceedings are not administrative;
11 that they are quasi-judicial in nature.

12 THE COURT: What case holds that?

13 MISS McDONALD: I would have had the case today
14 had I known that Steffel v. Thompson had been raised.

15 THE COURT: You better write me with a copy to
16 Mr. Olick about those cases.

17 MISS McDONALD: Yes.

18 The other point I would like to direct myself to
19 is the contention of the plaintiff that the Grievance
20 Committee has acted in bad faith. I wish to explain the
21 reasons behind the delay, such as it was. That was
22 occasioned in the prosecution of this matter. The first
23 information that the Grievance Committee had concerning the
24 possible connection of the plaintiff in the 1965 and 1966
25 events came in a newspaper article appearing in the New

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2 York Times in January of 1970. It was simply noted
3 that the plaintiff, an attorney, was mentioned as being
4 part of these events.

5 Some time after that, and our records are not
6 clear and I was not with the Grievance Committee at that
7 time, the contents of the grand jury testimony were brought
8 to the attention of the Grievance Committee. It was
9 formally done in early 1970 by Francis Rogers. In any
10 event, during 1970 the Grievance Committee knew that all
11 these matters were in the hands of the District Attorney's
12 office, who was prosecuting various individuals involved
13 in this whole scheme.

14 It is the position of the Grievance Committee and
15 the Appellate Division that the Association of the Bar does
16 not intervene in criminal proceedings even though an attorney
17 is involved. The Association of the Bar should await
18 disposition of matters in Criminal Courts.

19 Now, the grand jury minutes in question concerned
20 the testimony of some 30 or 40 individuals. They consist
21 of about 1500 pages. They were not available to our
22 Committee until the criminal prosecutions were concluded
23 in those cases.

24 It is not the practice of the District Attorney's
25 office to let go of its grand jury minutes when it is using

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1 them in the prosecution of individuals.

2 THE COURT: You got those minutes in early 1971?

3 MISS McDONALD: Yes.

4 THE COURT: What happened then?

5 MISS McDONALD: There were two people, as we
6 stated it in our opposing affidavit, who we felt should have
7 priority. Those two individuals were Michael Freyberg
8 and Herbert Itkin. They were two individuals who public-
9 ly brought disgrace to the Bar. We felt that these two
10 individuals deserved the --

11 THE COURT: What were the proceedings as to
12 those people?

13 MISS McDONALD: There was a petition filed in
14 the Herbert Itkin matter, I believe, in late 1971. That
15 was not followed through with because Mr. Itkin eventually
16 resigned from the Bar without having that matter prosecuted
17 further.

18 The Freyberg matter was -- we were appointed
19 prosecutors in that matter some time in 1971, but we
20 decided these two --

21 THE COURT: What do you mean "appointed prosecutor"?

22 MISS McDONALD: Every particular case normally
23 has appointed prosecutors by the Appellate Division when the
24 matter is ready to be presented to the Appellate Division.
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1 THE COURT: What is the procedure?

2 MISS McDONALD: If an attorney is convicted of
3 a crime --

4 THE COURT: I will ask you to do this:

5 I would like you to put in an affidavit the
6 circumstances which you are now describing. I think it
7 should be part of the record. I would like you to
8 include in the affidavit a description of the procedures
9 that take place. I gather there is an original inquiry
10 which is somewhat informal. Then there is a hearing.
11 Then there is a recommendation of it to the Appellate
12 Division. But that is all somewhat vague in my mind and
13 I would like you in your affidavit to specify exactly what
14 happens, exactly what appointments you receive and what
15 authorities you receive from whom, and so forth, and cite
16 it to the rules, if there are rules, because I think that
17 is necessary here and, secondly, I think you ought to
18 explain in your affidavit the chronology you have started
19 to give me.

20 Third, I think you better deal with the cases
21 cited in the brief. This is really the first time that
22 Mr. Olick has dealt with the abstention problem and I would
23 be glad to have you reply to that, if you want to do it.

24 MISS McDONALD: Yes.

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2 THE COURT: Now, there is a case, a fairly
3 recent case in the Supreme Court, which deals with the
4 abstention problem, which is more recent than Steffel against
5 Thompson. I don't know whether it has any bearing on our
6 problem. I think one of the names in the title is
7 Allee, and it is quite recent. I think you better look
8 at that. There is a long dissent by Justice Burger, but
9 there is a lot about the Younger problem in that. I think
10 you better look at that and see if it has any bearing on
11 our case.

12 I think, with that, we might as well terminate
13 the hearing this morning and I will reserve decision pending
14 the further papers.

15 When can you get your materials in?

16 MISS McDONALD: I would like until Wednesday,
17 July 10th.

18 THE COURT: That is fine. We had a pretty good
19 discussion on the record. I would appreciate the parties
20 ordering the transcript.

21 All right, we will suspend for now. Thank you
22 very much.

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Defendants.

SUPPLEMENTAL
AFFIDAVIT IN OPPOS-
ITION TO DEFENDANTS'
MOTION TO DISMISS

STATE OF NEW YORK)
)
COUNTY OF KINGS) SS.:

MARK A. LANDSMAN, being duly sworn, deposes
and says:

1. I am an attorney duly admitted to practice law before the Courts of the State of New York, the United States District Courts, Southern and Eastern Districts of New York, and I maintain law offices at 66 Court Street, Brooklyn, New York.

2. In addition I am the duly elected Village Justice of the Village of Atlantic Beach of Nassau County, State of New York.

3. This affidavit is submitted at the request of Arthur S. Olick, Esq., a member of the firm of Anderson, Russell, Kill and Olick, attorneys for the plaintiff-attorney and in support of the relief sought for injunctive or declaratory judgment relief against the defendants herein.

4. It is sincerely and respectfully the intention of your deponent that the historical facts provided hereinafter may, in some material measure, prove of assistance to this Honorable Court in its deliberations upon the issues presented before it.

5. During approximately September of 1968, your deponent was retained by the plaintiff-attorney herein, as his counsel, in connection with a request he received from the office of the District Attorney, County of New York for his appearance to furnish testimony as a witness before the October, 1968 Grand Jury in a matter entitled People v. John Doe; said matter being an inquiry involving a complaint against another attorney, Michael Freyberg.

6. Upon arrival at the offices of the District Attorney in New York County, during October of 1968, your deponent determined that this inquiry was being conducted by Francis J. Rogers, an Assistant District Attorney. After detailed discussions with Mr. Rogers and other officials of the District Attorney's office to the effect that if called to testify before the Grand Jury, the plaintiff-attorney herein would properly invoke his Constitutional privilege against self-incrimination as guaranteed to him by the Fifth Amendment to the United States Constitution, it was agreed that plaintiff-attorney would, if he testified fully, truthfully and cooperated with the state authorities, be granted full transactional immunity.

7. However, with the possibility present that some aspect or part of his testimony might cause, or perhaps give rise, to

an interpretation that one or more of the Canons of Professional Ethics appeared violated, your deponent also deemed it necessary and proper to protect his client and to obtain an understanding with and commitment from, the District Attorney's Office that they would neither refer the testimony of the plaintiff-attorney to the Association of the Bar of the City of New York nor recommend to such body that any punitive disciplinary action be taken against the plaintiff-attorney, as a result of that State Authority having compelled his testimony to be given under the grant of complete immunity. It was, accordingly, the clear understanding of all parties that the plaintiff-attorney would furnish testimony fully, truthfully and cooperatively without fear of any subsequent criminal or disciplinary prosecutions arising out of such compelled testimony.

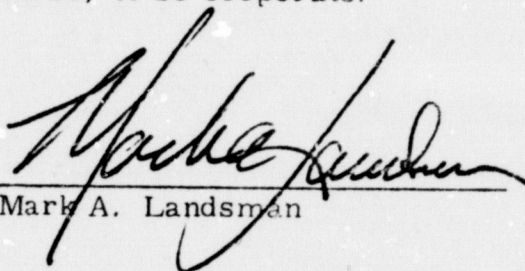
8. Your deponent, upon information and belief, submits that the plaintiff-attorney was cooperative with the State Authorities and that he did, indeed, testify fully and truthfully; that he never knew, met or spoke with any of the public official targets of the investigation, i. e., Messrs. Freyberg, Itkin or Marcus; and that, in fact, Messrs. Freyberg, Itkin and Marcus also furnished testimony and/or statements to the effect that they never knew, met or spoke with, the plaintiff-attorney.

9. Your deponent is further advised that no indictments relating to conspiracy, bribery or any crimes (other than perjury)

were ever returned by the Grand Jury as to any of the parties who gave testimony as to this matter; no crimes, other than false swearing, were charged against any persons in connection with this inquiry into the delaying or blocking of a certain application for a zoning variance before the City Planning Commission.

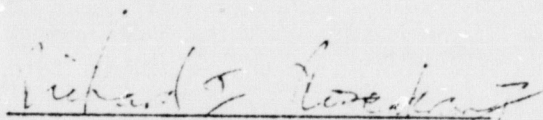
10. In any event, the facts and circumstances surrounding the promises and immunities granted to the plaintiff-attorney by the authorized representatives of the state authority, are, to the best of my recollection, accurately recited hereinabove and they actually took place and occurred in my presence and as well as in the presence of the plaintiff-attorney.

11. Should this Honorable Court deem as necessary, any further particulars in connection with the foregoing, your deponent will remain available, of course, to so cooperate.


Mark A. Landsman

Sworn to before me this

8th day of July, 1974.



RICHARD I. ROSENKRANZ
Notary Public, State of New York
No. 31-8556465
Qualified in New York County
Commission Expires March 30, 1976

SUPPLEMENTARY AFFIDAVIT IN OPPOSITION TO THE MOTION FOR A
PRELIMINARY INJUNCTION AND IN SUPPORT OF THE CROSS-MOTION
TO DISMISS

99a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ANONYMOUS, an Attorney Admitted to :
Practice in the State of New York, :

Plaintiff, :

-against- :

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK and JOHN G. BONOMI, :
Chief Counsel, Committee on :
Grievances of The Association of the :
Bar of the City of New York, :

Defendants. :
-----X

DEFENDANTS'
SUPPLEMENTARY
AFFIDAVIT

74 Civ. 2398 (TPG)

STATE OF NEW YORK :
COUNTY OF NEW YORK : SS.:

MARY McALD, being duly sworn deposes
and says:

1. Pursuant the request of the Court during
oral argument of this matter on July 3, 1974, I submit this
affidavit as 1) an outline of the procedures followed by
the Committee on Grievances of The Association of the Bar
of the City of New York in the investigation and prosecution
of attorneys allegedly guilty of professional misconduct and
2) a particular history of the investigation and prosecution
of proceedings against plaintiff and other attorneys involved
in a connected scheme of alleged wrongdoing.

PROCEDURES OF THE COMMITTEE ON GRIEVANCES

2. The Committee on Grievances is a standing
committee of The Association of the Bar of the City of New

York. The Committee is not to be regarded as an informal body that acts in disciplinary matters on an ad hoc basis. It is a quasi-judicial body that acts under the By-Laws of the Association, under a well established body of statutory and decisional law, and under the rules and directives of the Appellate Division, First Department. Matter of Branch, 178 App. Div. 585 (1st Dept. 1917); People ex rel. Karlin v. Culkin, 248 N.Y. 475; Section 90, Judiciary Law and Rule 603 of the Rules of the Appellate Division, First Department.

3. The Committee has authority to investigate charges of professional misconduct, to compel the attendance of witnesses and the production of records, to take testimony under oath, to admonish respondents in appropriate cases and prosecute disciplinary proceedings before the Court. The Committee or its Chief Counsel may initiate any investigation or may undertake same upon complaint by any person. The respondent is required either to submit a written statement concerning the allegations of the complaint or to appear in person, depending upon the nature and complexity of the issues raised. Failure to reply, to cooperate or to be candid is improper, obstructs the necessary work of the Committee and not infrequently results in formal charges that might otherwise not be served. Moreover, in and of itself, it constitutes professional misconduct under the Code of Professional Responsibility and decisions of the Court unless predicated upon an asserted claim that a response might tend to incriminate, Spevack v. Klein, 385 U.S. 511 (1967).

4. A determination that appropriate proceedings be initiated result, in the usual case, in the filing

of formal charges and the scheduling of hearings before a panel of the Committee. In cases concerning crimes involving moral turpitude or where the public interest requires prompt action, a hearing before the Committee is dispensed with and a recommendation is made to the Executive Committee of the Association of the Bar that disciplinary proceedings be instituted directly in the Appellate Division.

5. When hearings before the Committee are concluded, the decision of a panel may take one of three forms: it may dismiss, it may admonish or it may recommend further prosecution in the Court. In the latter event the Committee submits a written report to the Executive Committee of the Association and requests authority to continue prosecution in the Court. An admonition by the Committee is, in effect, a censure of the respondent and a suspension of further action. The admonition is administered in private and becomes a part of the files of the Committee. If the respondent becomes the subject of another charge, the previous admonition is then brought to the attention of the panel of the Committee hearing the matter so it may receive weight in its determination as to whether or not to again admonish the respondent or refer the matter to the Appellate Division. If prosecution in the Court is initiated, the fact of the prior admonition is made known to the Court.

6. As has already been noted in this proceeding, Counsel to the Committee on Grievances received, under Court order and upon the application of Assistant District Attorney Francis J. Rogers, the transcript of plaintiff's Grand Jury testimony in March 1971. It should be noted that plaintiff's

name was specifically mentioned in such application as one of several attorneys who were under investigation and whose testimony, in the interests of justice, should be brought to the attention of the Committee on Grievances.

7. Plaintiff has submitted to this Court the affidavit of MARK A. LANDSMAN, an attorney who represented him when he was called before the New York County Grand Jury. Mr. Landsman indicates that there was an "understanding" between the state prosecutors and himself that plaintiff's testimony, if such were given, would not be referred to the Committee on Grievances. It is most astonishing that such an allegation is now made, some 13 months after the original proceeding in this matter was initiated. Such a contention has never been made before by plaintiff, but in any event the allegation has no effect upon the validity of disciplinary proceedings commenced by the Committee on Grievances.

8. Such an understanding, if such were ever reached, could not have been an inducement to plaintiff to testify before the Grand Jury. The fact that the Grand Jury granted plaintiff immunity necessitated his testimony no matter what his so-called understandings were. Plaintiff testified not for lack of fear of referral of his testimony to the Committee on Grievances but because he was compelled to do so and his failure to testify would have resulted in a contempt of court citation. Secondly, plaintiff must admit that the record of the grant of immunity makes absolutely no mention that plaintiff would not be the subject of a future disciplinary proceeding. Lastly, the state prosecutors, being attorneys themselves, must, under the directives of the Code of Professional Responsibility, come forward with evidence or information which indicates professional wrongdoing by another

attorney. Thus, the District Attorney's office could exercise no discretion relative to the referral of plaintiff's testimony to the Committee on Grievances.

103a

9. Once the Grand Jury transcripts in question were received by Counsel to the Committee, their over 1500 pages were reviewed in detail by Counsel's staff. The testimony concerned not only plaintiff, Michael Freyberg and Herbert Itkin, but also involved at least five other New York attorneys whose conduct had to be evaluated.

10. Since Michael Freyberg had been indicted and convicted of the crime of perjury in the third degree, a crime involving moral turpitude, a disciplinary proceeding was initiated with Executive Committee approval directly in the Appellate Division without first conducting hearings before a panel of the Committee on Grievances. Counsel for the Committee on Grievances was appointed prosecutor of the Freyberg matter in February, 1971 by the Appellate Division and an order was entered suspending him from the practice of law for three years on November 8, 1973. In every disciplinary matter prosecuted in the Appellate Division, Counsel for the Committee on Grievances is officially appointed prosecutor in order to facilitate reimbursement for its services under Section 90 of the New York Judiciary Law.

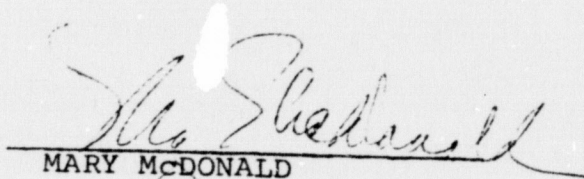
11. Investigation of Herbert Itkin commenced as early as 1966 on a complaint that he had converted escrow funds. Counsel to the Committee was appointed prosecutor on this charge in January, 1968. Subsequent to the commencement of this prosecution, information was steadily accumulated by Counsel to the Committee indicating extensive wrongdoing by Itkin and such information included the Grand Jury minutes in question. Itkin became a witness for the federal government in numerous criminal prosecutions and was eventually removed

from the State and afforded a new identity by federal prosecutors. Such occurrences prevented the holding of hearings before a special Referee appointed by the Appellate Division, However, with the assistance of federal prosecutors, Itkin's consent was obtained to an order voluntarily striking his name from the roll of attorneys. Such order was entered in October, 1973.

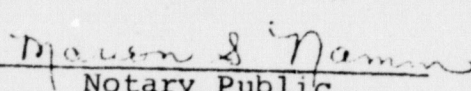
12. It was ultimately determined by Counsel to the Committee that there was evidence warranting prosecution of only Freyberg, Itkin and plaintiff and none of the other five attorneys implicated in the scheme to influence public officials. Accordingly, plaintiff was contacted in January, 1973 relative to this matter and a disciplinary proceeding initiated against him in May, 1973. Admittedly, a two year period elapsed from receipt of the Grand Jury minutes until initial communication with plaintiff. It was certainly clear from the original reading of plaintiff's testimony that a disciplinary proceeding must be initiated against him. The delay experienced in initiating same was occasioned chiefly by the fact that numerous other investigations and proceedings were involved therein and plaintiff's prosecution ultimately occurred last. There is no evidence indicating malice or intent to harass by such delay. It was a totally innocent happening which regrettably occurs in an office so overburdened and understaffed as is that of Counsel to the Committee on Grievances. The demands on such office are so overwhelming that some delay is unavoidable while certainly is of no venal character.

13. Lastly, for the sake of clarity, it appears necessary to include within this record a statement to the Court as to the basis on which plaintiff was granted a

rehearing before a panel of the Committee on Grievances. Your deponent was privy to the Chairman's decision in this regard and thus has first-hand knowledge as to the reason for granting a rehearing. In March, 1974, Counsel to the Committee discontinued its practice of including information concerning prior discipline in its charge letters and formulated a new procedure of eliciting such information on the cross-examination of a respondent or furnishing such information to a panel after charges of professional misconduct are sustained. Such information must be considered by a panel in reaching a conclusion on whether to admonish a respondent or recommend his further prosecution in the Appellate Division. Since plaintiff had submitted such inclusion of prior discipline as a ground for granting a rehearing such request was approved by the Chairman of the Committee. A rehearing was granted for no other reason and certainly not on the ground that compelled testimony was used as part of the affirmative case against plaintiff. It would be quite incredible to grant a rehearing on such a ground and then initiate a new proceeding based upon the same compelled testimony.


MARY McDONALD

Sworn to before me this
10th day of July, 1974.


Notary Public

MARION S. NAMM
NOTARY PUBLIC, State of New York
No. 41-8095970
Qualified in Queens County
Commission Expires March 30, 1976

**FURTHER REPLY AFFIDAVIT IN SUPPORT OF THE MOTION FOR A
PRELIMINARY INJUNCTION AND IN OPPOSITION TO THE CROSS-
MOTION TO DISMISS**

106a

-----x
ANONYMOUS, an Attorney Admitted
to Practice in the State of New York

: 74 Civ. 2398
(TPG)

Plaintiff,

- against -

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK and JOHN G. BONOMI,
Chief Counsel, Committee on Grievances
of the Association of the Bar of the
City of New York,

: FURTHER REPLY AFFIDAVIT
: IN SUPPORT OF PLAINTIFF'S
: MOTION FOR A PRELIMINARY
: INJUNCTION AND IN OPPOSI-
: TION TO DEFENDANTS'
: CROSS-MOTION TO DISMISS

Defendants.

-----x
STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

ARTHUR S. OLICK, being duly sworn deposes and says:

1. At the conclusion of the hearing held before
Honorable Thomas P. Griesa, United States District Judge, on July
3, 1974, counsel for the defendants was asked to furnish an
affidavit describing the procedures of the Association of the Bar
of the City of New York and its Committee on Grievances and to
further specify the circumstances underlying the instant proceed-
ing before the Bar Association of which plaintiff complains. In
consequence, the Affidavit of Mary McDonald, Esq., verified July
10, 1974 was served upon deponent yesterday afternoon and, pre-
sumably has now been filed.

2. Miss McDonald's Affidavit is misleading and defec-
ent in several important respects. Accordingly, deponent submits
the following additional information to the Court for its guid-
ance in determining, most particularly, the sufficiency of

plaintiff's complaint and the applicability of the doctrine of 107a federal abstention as enunciated in Younger v. Harris, 401 U.S. 37 (1971) and in Erdmann v. Stevens, 458 F.2d 1205 (2nd Cir.) cert. denied, 409 U.S. 889 (1971). Like the several versions of the infamous Watergate tapes, there are glaring differences between the description of Bar Association powers and procedures as set forth in Miss McDonald's Affidavit and in the Bar Association's own written procedures for the conduct of disciplinary proceedings by the Committee on Grievances. The McDonald Affidavit gratuitously describes the Grievance Committee as a "quasi-judicial body", as "an arm of the Appellate Division" and as a "prosecutor". In truth and in fact, the Grievance Committee of the Bar Association has no such power and performs no such function. Its activities are sui generis and its "findings" and "determinations" are not binding in any sense upon the Appellate Division. It functions to recommend or call to the attention of the Appellate Division matters relating to the discipline of attorneys. Only the Court itself has the power to discipline an attorney. As the Erdmann case itself demonstrates, the Appellate Division sometimes acts on its own volition contrary to the "recommendations" of the Grievance Committee of the Bar Association. Even where the Grievance Committee, after securing the approval of the Executive Committee of the Bar Association, calls a matter of discipline to the attention of the Appellate Division, it is the Appellate Division which must authorize any disciplinary prosecution and it is the Appellate Division which proceeds de novo to determine whether discipline is warranted in any particular case. The Appellate Division, if it decides to proceed, usually but not always, designates the counsel to the Grievance Committee as prosecutor in a disciplinary proceeding before the Court but in such proceeding, there is a de novo hearing before a referee.

the administrative-type hearing held before the Grievance Committee. New testimony is taken and an entirely new determination is made on the basis of which the Appellate Division ultimately determines whether an attorney should be disciplined. In essence, the proceedings before the Grievance Committee are of significantly lesser importance than those before the ordinary administrative agency whose factual determinations are reviewed by a Court only for legal insufficiency or arbitrary and capricious actions. In the case of the discipline of an attorney the proceedings before the Grievance Committee have no weight whatsoever.

3. Annexed hereto as Exhibit "C" and made a part hereof, is a copy of defendants' own "Procedures of the Committee on Grievances". Annexed hereto as Exhibit "D" and made a part hereof, is a copy of defendants' "Confidential Outline of Procedures of the Committee on Grievances" distributed by defendants to all members of the Committee on Grievances. These documents establish beyond peradventure that the proceedings initiated by defendants which plaintiff now wishes to enjoin as violative of his constitutional rights are in no sense judicial in nature and, therefore, do not fall within the proscribed scope of Younger v. Harris and Erdmann v. Stevens. Even a cursory comparison of defendants' Supplementary Affidavit and defendants' "Outline of Procedures" establishes the spurious nature of defendants' claim of federal abstention:

defendants' Supplementary
Affidavit

"It (the Committee) is a quasi-judicial body that acts under. . . " (p. 2)

Actual Version in Procedures
Manual of the Committee on
Grievances (Exhibit "C")

"It (the Committee) is a quasi-official body that acts under. . ." (p. 2)

"... the procedures of the Committee or its quasi-official status under relevant provisions of law and the rules of the Appellate Division." (p. 1)

Defendants' Supplementary
Affidavit

Actual Version in Procedures
Manual of the Committee on
Grievances (Exhibit "C")

". . .the Committee submits a written report to the Executive Committee of the Association and requests authority to continue prosecution in the Court." (p.3)

". . .to admonish respondents in appropriate cases, and prosecute disciplinary proceedings before the Court." (p.2)

"An admonition by the Committee is, in effect, a censure. . . ." (p.3)

omitted

omitted

omitted

". . .the Committee submits a written report to the Executive Committee of the Association and requests authority to proceed in Court." (p.6)

". . .to admonish respondents in appropriate cases, and (after approval by the Executive Committee of the Association) to initiate and prosecute disciplinary proceedings before the Court." (p.2)

"An admonition by the Committee is in effect, a rebuke. . . ." (p.7)

"It consists of a Chairman and twenty-four members, appointed by the President of the Association. Although the members of the Committee contribute their time and effort as a public service, the Committee's case load is such that for many years it has employed a staff of full-time attorneys, clerks and secretaries. The staff is under the charge of the Chief Counsel, who acts under the direction of the Committee and its Chairman. The cost of maintaining the services rendered by the Committee is quite large: funds for this purpose are provided by the Association..." (pp. 1 and 2)

"Any inquiry from Counsel should be acknowledged and answered promptly and with complete candor; cooperation with Counsel in conferences is equally essential." (p.3)

"If the charges (of the Committee) are entertained, the Court ordinarily appoints a referee

to hear and report. . . In disciplinary proceedings before the court, neither the Committee nor the referee suggest that any particular form of discipline should be administered. They merely present the facts, and the court, if it sustains the charges, retains the prerogative of determining for itself whether the respondent should be censured, suspended or disbarred. If the court finds that the charges are not sustained, they are dismissed." (p, 6 and 7)

4. The alleged statutory authority of the defendants is largely non-existent. Section 90 of the Judiciary Law of the State of New York makes no mention of the Bar Association or its function in connection with the discipline of attorneys. Section 603.12 of the Rules of the Appellate Division, First Department simply give subpoena power to the Bar Association Committee on Grievances in connection with the conduct of "a preliminary investigation of professional misconduct on the part of an attorney. . ." Significantly, the subpoena may not be issued by the Committee itself but must be issued by the Clerk of the Court in the name of the presiding Justice of the Appellate Division. Moreover, it is only in connection with the conduct of "a preliminary investigation" that the defendants are empowered to "take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths." The actual procedures of the Committee on Grievances are set forth in By-Law XIX of the Association of the Bar of the City of New York which, in pertinent part, states:

"9. In all proceedings the committee, or its subcommittee, shall either dismiss or sustain the charges and, as to any charges sustained, shall either admonish the respondent or recommend that such charges be prosecuted in the court."

"10. If the committee, or its subcommittee, recommends the prosecution of any charges in the courts, it shall submit to the Executive Committee a written report summarizing the charges, the evidence, and the findings and recommendations of the committee or subcommittee. The Executive Committee may take such action upon such report as in its judgment is proper, except that approval of a recommendation of prosecution of charges in the courts shall be by the affirmative vote of a majority of the whole Executive Committee, or two-thirds of the members of the Executive Committee present at the meeting, whichever is greater."

"11. If the Executive Committee shall approve prosecution of the respondent in the courts, the Executive Committee may appoint, or authorize the President to appoint, one or more members of the Association whose duty it shall be to conduct the prosecution of the respondent under the instructions and control of the Committee on Grievances; the Executive Committee may authorize the Committee on Grievances to make such appointment and conduct such prosecution provided that no expense or liability shall be incurred by the Committee on Grievances for such purpose not previously authorized by the Executive Committee."

"14. The Executive Committee from time to time shall appoint an attorney to be the Chief Counsel for the Committee on Grievances, and it may also appoint one or more attorneys to be assistants to the Chief Counsel. The Chief Counsel and the assistants shall either be members of the Association at the time of their appointment or shall apply for membership upon their appointment, with their continued employment to be contingent upon their acceptance into membership. The Chief Counsel and his assistants shall perform such services as may be prescribed by the Committee on Grievances or by the Executive Committee. The Executive Committee shall fix the compensation of the Chief Counsel and assistants."

Turning to the particular event underlying the pending proceedings there are several glaring and puzzling inconsistencies in defendants' opposing papers. In paragraph 3 of her Affidavit of June 17, 1974, Miss McDonald stated that an order was entered in the Supreme Court New York County, "authorizing the release to the Committee on Grievances" of certain Grand Jury minutes "all being inquiries involving an attorney, Michael Freyberg, who was convicted of the crime of perjury in the third degree on December 17, 1970." An examination of the Court Order which is annexed to deponent's Reply Affidavit of July 2, 1974 as Exhibit "A", confirms this fact. However, in her Affidavit of July 10, 1974, Miss McDonald implies that the matter of plaintiff's activities was called to the attention of the Bar Association by Assistant District Attorney Francis J. Rogers who allegedly had an obligation to do so under the Code of Professional Responsibility. Of course, the Court Order dated February 4, 1971 relates only to "inquiries involving a complaint against Michael Freyberg, an attorney..." who had shortly before that date been convicted of perjury before the Grand Jury. Miss McDonald conceded at page 44 of the transcript of the hearing of July 3, 1974 that "the first information that the Grievance Committee had concerning the possible connection of the plaintiff in the 1965 and 1966 event came in a newspaper article appearing in The New York Times in January of 1970." It would have been most helpful had Miss McDonald identified this particular newspaper article since, as deponent stated in his Affidavit of July 2, 1974 [paragraph 6], the only newspaper articles deponent has been able to locate were in or about February of 1969. In any event, the first notice given to plaintiff of any proceeding or activity by the Bar Association was that contained in Defendants' letter to plaintiff of January 11, 1973 referring

to a "Newspaper Article". Further, as noted in the Affidavit of Mark A Landsman, Esq., the attorney who represented plaintiff when he was called before the New York County Grand Jury and who dealt with Assistant District Attorney Rogers, the District Attorney's office gave plaintiff to understand that it would not be a party to referring his Grand Jury testimony given under a grant of transactional immunity to the Bar Association for disciplinary proceedings. It appears that there has been a studious effort in this case to conceal from the plaintiff, his counsel and from the Court the manner in which the proceedings against plaintiff were initiated.

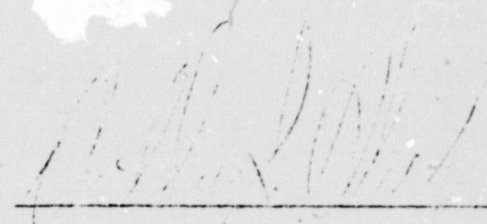
5. What is clear is that there is no valid excuse for the inordinate delays in this matter. The operative events took place in 1966. The Grand Jury testimony of the plaintiff was given in 1968. It was in 1969 or 1970 (depending upon whether Miss McDonald's claim of a newspaper article in 1970 can be substantiated) that the Bar Association actually had knowledge of plaintiff's connection with the subject matter concerning which he testified before the Grand Jury. It was in February of 1971 that the subject Grand Jury minutes were actually released to the defendants. Nevertheless, it was not until January 11, 1973 that any proceeding of any kind (formal or informal) was initiated before the Grievance Committee. In her opposing Affidavit of June 17, 1974 (paragraph 20) Miss McDonald suggests that the delay was attributable to "various priorities" established by the Grievance Committee. At the hearing of July 3, 1974 (pages 45-46) Miss McDonald suggested that "it is not the practice of the District Attorney's office to let go of its Grand Jury minutes when it is using them in the prosecution of individuals" and that

the Bar Association had to wait until after the disposition of the Itkin and Freyberg criminal prosecutions before it could proceed. Of course, there has never been any criminal prosecution brought against this plaintiff and this plaintiff, as Miss McDonald well knows, was never even acquainted with Messrs. Freyberg and Itkin and never dealt with them. In any event, all criminal prosecutions against these individuals were concluded late in 1970. Accordingly, Miss McDonald in her most recent Affidavit of July 10, 1974 seeks to explain the inordinate delay on the basis that the Committee on Grievances is "over burdened and under staffed". In other words, defendants now candidly admit that they were "too busy" to get around to the plaintiff until January 1973, five years after the Grand Jury testimony and two years after such testimony was actually in defendants' possession. Certainly, such delays are manifestly prejudicial to the plaintiff and, in and of itself, constitutes bad faith. The inadvertence of counsel for the Bar Association is hardly an excuse when compared with the problems encountered by plaintiff in recalling events, obtaining evidence and securing witnesses. Ordinarily, the law prescribes limitations by statutes or court rule on the bringing of actions and proceedings. Here, there is no such statutory or judicial rule but deponent submits that the ancient doctrines of laches and estoppel are applicable.

6. Finally, deponent protests the gratuitous statement in Miss McDonald's Affidavit of July 10, 1974 [paragraph 13] respecting the basis on which the plaintiff was granted a new hearing before a panel of the Committee on Grievances. Annexed hereto as Exhibit "D" and made a part hereof is deponent's letter of March 7, 1974 to Powell Pierpoint, Esq., Chairman of the Committee on Grievances. This letter sets forth deponent's

application, on plaintiffs behalf, for a new hearing. Some weeks after March 7, 1974, deponent was orally advised that the application had been granted. No reason for the granting of the application for a new hearing has ever been given to deponent or to plaintiff. The reference to a March 1974 change in Grievance Committee practice is indeed humorous. The change in practice, it is submitted, was instituted directly as a result of deponent's letter of March 7, 1974 [Exhibit "D"] and has never been formalized in writing insofar as deponent is able to ascertain. Apparently, defendants did not wish, for reasons of their own, to test the validity of their procedures of which deponent, on plaintiff's behalf, complained.

WHEREFORE, deponent submits, once again, that the motion to dismiss the complaint for legal insufficiency be denied and that plaintiff's motion for a preliminary injunction be granted. At the very least, the pending action should be considered as one for declaratory relief and, even if injunctive relief is deemed inappropriate, the Court may declare plaintiff right and treat his motion for injunctive relief as one for summary judgment pursuant to F.R. Civ. Proc. 56.



Sworn to before me this
11th day of July, 1974

DAVID E. HICKS
NOTARY PUBLIC
STATE OF NEW YORK
JULY 11, 1974

OPINION AND ORDER OF THOMAS P. GRIESA, U.S.D.J.
FILED AUGUST 1, 1974 DENYING THE MOTION FOR A
PRELIMINARY INJUNCTION AND DISMISSING THE
COMPLAINT

116a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Original
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FILED
U.S. DISTRICT COURT
AUG 1 1 29 PM '74
S.D. OF N.Y.

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ANONYMOUS, an Attorney Admitted to
Practice in the State of New York,

Plaintiff,

v.

74 Civ. 2398

THE ASSOCIATION OF THE BAR OF THE CITY :
OF NEW YORK and JOHN G. BONOMI, Chief
Counsel, Committee on Grievances of the:
Association of the Bar of the City of
New York,

OPINION

Defendants.

41049

----- -X

GRIESA, J.

Plaintiff is an attorney admitted to practice
in the State of New York, against whom disciplinary
proceedings are pending before the Committee on
Grievances of the Association of the Bar of the City of
New York (hereafter "Bar Association"). Defendants are
the Bar Association and John G. Bonomi, chief counsel
to the Bar Association's Committee on Grievances.
Plaintiff has brought this action seeking injunctive
relief against the use by defendants in the disciplinary

MICROFILM

AUG 2 1974

proceedings of grand jury testimony given by plaintiff under a grant of immunity. Plaintiff claims that such use of compelled testimony is unconstitutional in violation of his Fifth Amendment right against self-incrimination, as made applicable to the states by the Fourteenth Amendment.

Plaintiff has moved for a preliminary injunction. Defendants have cross-moved to dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted. Plaintiff's motion is denied. Defendants' motion is granted.

Facts

History of the Disciplinary Proceedings

At various times in 1967 and 1968 plaintiff testified before the New York County Grand Jury, under a grant of immunity from prosecution, concerning the role he and others played in certain events in 1965 and 1966. Defendants allege that plaintiff admitted to the grand jury that he had participated as an intermediary in negotiations for the transfer of a sum of money intended to unlawfully block, or delay approval

of, an application for a zoning variance then pending before a New York City agency. These alleged activities are the basis of the disciplinary charges presently pending against plaintiff.

Although plaintiff appeared before the grand jury in 1967 and 1968, his name did not come to the attention of the Committee on Grievances, in connection with possible unprofessional conduct, until some time in 1969 or 1970.

On February 4, 1971 defendants obtained an order in New York County Supreme Court authorizing the release of certain grand jury minutes which included the testimony which had been given by plaintiff.

On January 11, 1973 the Committee requested plaintiff to appear at the Committee's office to discuss his grand jury testimony. Plaintiff retained counsel, who requested that he be permitted to submit a written statement by plaintiff in lieu of a personal appearance. The request was granted, and plaintiff submitted a statement dated April 26, 1973 which detailed his role in the events of 1965 and 1966.

On May 31, 1973 the Committee instituted a disciplinary proceeding against plaintiff by serving

on him a written notice of charges of unprofessional conduct concerning the events he testified about before the grand jury. On June 13, 1973 plaintiff submitted an answer admitting certain of the facts alleged by the Committee, but denying any illegal or unprofessional conduct on his part. On June 21, 1973 a hearing was held during which plaintiff's grand jury testimony and his April 26, 1973 statement were received in evidence without any objection by plaintiff or his counsel. Plaintiff ^{also} testified on his own behalf, and was cross-examined by counsel for the Committee. The panel of the Committee before whom the hearing was held sustained the charges and recommended that a disciplinary proceeding be instituted against plaintiff in the Appellate Division.

On March 7, 1974 plaintiff, having obtained new counsel, appealed to the chairman of the Committee for a new hearing on the basis of certain procedural irregularities and the admission into evidence of plaintiff's grand jury testimony. A new hearing was granted, but the reasons for doing so were not specified.

On April 16, 1974 plaintiff was served with a new notice of charges. On May 30, 1974, in the course of a hearing on the charges, the panel of the Committee hearing the charges received into evidence, over plaintiff's objection, plaintiff's grand jury testimony.

On June 4, 1974 plaintiff filed this action.

Procedures of the Committee on Grievances

The Committee on Grievances is a standing committee of the Association of the Bar of the City of New York. It has authority, derived from Judiciary Law 90, subds. 7 and 8 and Rule 603.12 of the Rules of the Appellate Division, First Department, to investigate charges of professional misconduct, to compel the attendance of witnesses and the production of records, to take testimony, to admonish attorneys in appropriate cases and to recommend prosecution of disciplinary proceedings before the Appellate Division.

Where further prosecution is recommended by the Committee, and authorized by the Appellate Division, a de novo hearing is held before a referee. The Appellate Division makes findings, and enters an order, based on this new hearing.

It appears that, in proceedings before the Appellate Division, counsel for the Committee are usually appointed to act as prosecutors.

Conclusions of Law

Plaintiff contends that use in the disciplinary proceeding of his grand jury testimony, compelled under a grant of immunity from prosecution, violates his Fifth Amendment right against self-incrimination. Defendants contend that a disciplinary proceeding is not a criminal prosecution, and therefore the Fifth Amendment is not applicable. Defendants assert that the New York courts have explicitly held constitutional such use of compelled testimony, Matter of Klebanoff, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968), cert. denied, 393 U.S. 840 (1968); Zuckerman v. Greason, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967), cert. denied, 390 U.S. 925 (1968), and that various decisions of the United States Supreme Court point to the same conclusion. See, e.g., Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967).

Plaintiff contends that these Supreme Court cases and other federal court authorities compel the opposite conclusion.

However, it is inappropriate for me to decide this question because I hold that the doctrine of federal court abstention applies, Younger v. Harris, 401 U.S. 37 (1971), and that plaintiff's complaint must be dismissed on this ground.

This result is dictated by the recent decision in Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972). In that case the plaintiff brought an action in the federal district court seeking declaratory and injunctive relief against disciplinary proceedings pending against him in the Appellate Division. He claimed that the proceedings were brought with a view to discouraging his exercise of First Amendment rights. The Court of Appeals affirmed the District Court's action in denying an injunction and dismissing the action.

The court held that the abstention doctrine set forth in Younger v. Harris applies to a disciplinary proceeding before the Appellate Division. The court found that such proceedings are judicial, not administrative, in nature. Judge Mansfield, writing for himself

and Judge Mulligan, noted that it is an open question whether the abstention doctrine applies with respect to state civil suits as well as state criminal prosecutions. He found, however, that it was unnecessary to resolve that question since in his and Judge Mulligan's view "a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding." 458 F.2d at 1209. Judge Mansfield went on to characterize such proceedings as "quasi-criminal" in nature. 458 F.2d at 1211. The opinion of Judges Mansfield and Mulligan also stated that the Younger abstention doctrine should be applied because of the unique relationship between the courts of a state and the attorneys admitted to practice before it.

"The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness." 458 F.2d at 1210.

Judge Lumbard, in a concurring opinion, stated:

"While these principles [of abstention] were stated in cases involving state criminal proceedings, I believe that they apply with equal force to proceedings regarding the conduct of members of the state bar." 458 F.2d at 1213.

Plaintiff points to language in a dissenting opinion by Judge Oakes in Tang v. Appellate Division, 487 F.2d 138, 146 n.4 (2d Cir. 1973), cert. denied, 42 U.S.L.W. 3555 (Apr. 1, 1974) as indicating that Erdmann may no longer be valid in light of the Supreme Court's recent decision in Gibson v. Berryhill, 411 U.S. 564, 575-577 (1973). But it would appear that Gibson is distinguishable from Erdmann, since in Gibson the disciplinary proceeding sought to be enjoined was before the state Board of Optometry, not any court or any committee acting under powers granted by a court.

It might be argued that the recent case of Blouin v. Dembitz, 489 F.2d 488 (2d Cir. 1973), departed to some extent from the rationale of Erdmann. In Blouin Judge Smith, in an opinion joined by Chief Judge Kaufman and Judge Oakes, stated:

"But we do believe that the particularly stringent formulation of that doctrine in Younger should be limited, at least until the Court instructs otherwise, to cases involving traditionally

criminal proceedings." 489 F.2d
at 490-491.

However, the fact remains that there has been no express overruling or disapproval of Erdmann by the Second Circuit or the Supreme Court. Clearly I am bound by Erdmann.

Plaintiff contends that there is an illogic in defendants' position that, on the one hand, the Fifth Amendment protection against self-incrimination does not apply to a disciplinary proceeding because such proceeding is not criminal in nature, and, on the other hand, the Younger abstention doctrine applies because such a proceeding is criminal in nature. If there is an anomaly here, plaintiff's position is at least as difficult. Plaintiff argues that a disciplinary proceeding should be held criminal in nature to permit application of the Fifth Amendment privilege, but non-criminal to prevent application of Younger.

These problems are interesting to consider, but they do not detract from the controlling force of Erdmann, which dictates that I must abstain from interference with the pending disciplinary proceedings against plaintiff. It should be noted, as indicated

by the quotations above, that Erdmann does not rest solely on the theory that a disciplinary proceeding is comparable to a criminal action, but relies in part on the theory that the courts of a state have a unique interest in their relationship with attorneys practicing in those courts, and the federal courts should be reluctant to interfere with that relationship.

Plaintiff contends that Erdmann can be distinguished from the present case, because there the disciplinary proceeding was before the Appellate Division, whereas here the disciplinary proceeding is before the Committee on Grievances. He contends that the present proceedings are not a pending state judicial proceeding, and therefore the considerations of equity, comity and federalism underlying the abstention doctrine do not apply. Steffel v. Thompson, ___ U.S. ___, 42 U.S.L.W. 4357, 4360 (March 19, 1974).

This contention must be rejected. The court in Erdmann described the closely related role of bar associations and the Appellate Division in disciplinary proceedings as follows:

"Under § 90(2) of the New York Judiciary Law (McKinney's Consol. Laws, c.30, 1968) the Appellate Division of each judicial department in the state is given the exclusive power to resolve issues as to alleged

misconduct of attorneys practicing within its jurisdiction. To implement this power it is vested with authority to hold a hearing to determine the facts of the alleged misconduct and to apply to them the relevant standards of conduct laid down in the Code of Professional Responsibility. Although the court, for practical reasons, invokes the assistance of bar associations and their committees to investigate and conduct hearings with respect to complaints regarding members of the bar, just as a federal court may employ special masters to hear and report, Rule 53, F.R. Civ. P., the disciplinary power continues to rest exclusively with the court." 485 F.2d at 1209.

Thus the Erdmann decision recognizes that a bar association committee acts to assist the state court, and derives its power from that court. A disciplinary proceeding commenced by a bar association committee and continued before the court is all part of one judicially ordained process. I would find it arbitrary to have the rule of the Erdmann case applicable to proceedings actually before the Appellate Division, but not applicable to proceedings at the bar association stage.

I note that Wiener v. Weintraub, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968), holds that a letter, addressed to a bar association grievance committee and containing accusations against an attorney, is the

initiation of a judicial proceeding and therefore absolutely privileged against a claim of libel.

Plaintiff further contends that the doctrine of abstention should not apply, because it is futile for plaintiff to pursue his constitutional argument in the state courts. Plaintiff argues that the New York courts have conclusively ruled that grand jury testimony compelled under a grant of immunity is admissible in a disciplinary proceeding. Matter of Klebanoff, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968), cert. denied, 393 U.S. 840 (1968); Zuckerman v. Greason, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967), cert. denied, 390 U.S. 925 (1968). However, I cannot concede the futility of resort to the "traditional method of obtaining adjudication of federal constitutional questions arising out of ... disciplinary proceedings" -- i.e., state court action followed by request for Supreme Court review. See Erdmann, 458 F.2d at 1211. I cannot concede that such a process is futile as to any really meritorious federal constitutional claim.

There is a further reason why federal intervention at this time is inappropriate. Defendants claim that, in failing to object to the use of his grand jury testimony at the first committee hearing in

1973, plaintiff waived any Fifth Amendment claim he may have had. On the other hand, plaintiff asserts that there was never any intention to waive any claims. This factual issue, if determined adversely to plaintiff, might moot the broader constitutional issue of whether testimony compelled under a grant of immunity may be used in a disciplinary proceeding. It would seem appropriate to permit the state courts to pass on this waiver issue.

Plaintiff claims that the court should nonetheless intervene since the disciplinary proceeding is brought in bad faith. See Younger v. Harris, 401 U.S. 37, 54 (1971). Plaintiff claims that there was a two-year delay in initiating the disciplinary proceeding from the time the grand jury transcripts became available. But such a delay hardly amounts to the kind of bad faith and harassment, with no hope of ultimate success in the prosecution, which the courts have found necessary to justify making an exception to the general rule of abstention. E.g., Dombrowski v. Pfister, 380 U.S. 479 (1965).

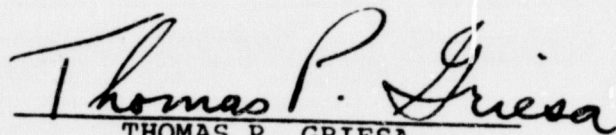
Plaintiff raises an additional argument about bad-faith. Plaintiff asserts that at the time he was granted immunity, prior to testifying before the grand jury, the District Attorney's office led him to believe that the testimony would not be referred to the Committee on Grievances, nor would the District Attorney's office recommend to the Committee that disciplinary action be taken. However, I conclude that this argument does not raise the kind of "bad faith" issue referred to in the abstention cases. This argument raises another factual and legal issue appropriate for decision in the state courts -- i.e., the scope of the agreement made with plaintiff at the time of his testimony.

Conclusion

Plaintiff's motion for a preliminary injunction is denied, and defendants' motion to dismiss the complaint is granted.

So ordered.

Dated: New York, New York
July 31, 1974


THOMAS P. GRIESA
U.S.D.J.

NOTICE OF APPEAL (Filed August 27, 1974)

RECEIVED

131a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUG 27 1974

-----X
ANONYMOUS, an Attorney Admitted to
Practice in the State of New York, :

Plaintiff, :

-against- :

THE ASSOCIATION OF THE BAR OF THE :
CITY OF NEW YORK and JOHN G. BONOMI, :
Chief Counsel, Committee on :
Grievances of the Association of the :
Bar of the City of New York, :

Defendants. :

S I R:

PLEASE TAKE NOTICE that ANONYMOUS, an Attorney Admitted to Practice in the State of New York, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the opinion and order of the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, Judge, dated July 31, 1974, and docketed on August 1, 1974, and the judgment entered thereon dismissing the plaintiff's complaint herein and denying plaintiff's motion for a preliminary injunction and from each and every part of said opinion, order and judgment.

Dated: New York, New York
August 26, 1974

Yours etc.,

ANDERSON, RUSSELL, KILL & OLICK, P.C.,
Attorneys for plaintiff
By: *[Signature]*

A Member of the Firm

Office and Post Office Address:
630 Fifth Avenue
New York, N.Y. 10020
(212) 397-9700

TO:
John G. Bonomi, Esq.,
Attorney for defendants

GRIEVANCE COMM.

NOTICE OF APPEAL

74 Civ. 2398 (TPG)

US COURT OF APPEALS: SECOND CUCIRCUIT

ANONYMOUS,
Plaintiff-Appellant,

against

THE ASS. OF THE BAR OF THE CITY OF NEW YORK,
Defendants - Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 12th day of October 1974 at 36 W. 44th St., New York
November
deponent served the annexed *Appendix* upon

Bar Association of New York

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 12th
day of November 19 74

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

